In the Supreme Court,

State of Kansas.

J. B. BILLARD, Plaintiff in Error,
vs.
THE BOARD OF EDUCATION OF THE CITY OF TOPEKA, Defendant in Error.

No. 13,481.

Brief for Defendant in Error.

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THE ISSUES UNDER THE PLEADINGS.

COUNSEL for plaintiff in error have set out the pleadings in full in their brief, and therefore we shall not set them out again herein; but as counsel's statement of the issues made by the pleadings is by no means accurate, we shall here state the issues as we understand them.

Every allegation of *fact* contained in the writ was specifically admitted, with the following exceptions:

"That his son Philip Billard, of the age of ten years, is duly qualified to be a pupil in said schools and in the school hereinafter named, and is, was and had been duly entitled by law to attend said school and to enjoy all the privileges thereof." (Rec., p. 105.)

This is specifically admitted, except, as the answer says, "for the facts hereinafter stated" (Rec., p. 110); that is,

except as he has forfeited his rights by a refusal to obey the orders of the Board.

"Of a religious character and a form of worship consisting of prayer, singing of religious songs, reciting the Lord's Prayer, and reading of the Bible, called by you and by said principal general exercises." (Rec., p. 105.)

This is denied, except as follows:

"That said general exercises were upon said morning, and uniformly had been since the opening of said school in September, 1901, as follows, *and not otherwise:*

"The teacher in charge of said school first repeated the following words, taken from the book commonly called the Bible:

[Here are set forth the words composing what is commonly known as the Twenty-third Psalm.]

"After repeating the said words the said teacher repeated the following words, also taken from the book commonly called the Bible:

[Here follow the words taken from the Bible, commonly called the Lord's Prayer.]

"That such of the pupils present as desired to do so repeated the foregoing words with the said teacher;

"That thereafter the said teacher read to the pupils some story or portion of story such as would interest and at the same time instruct said pupils from the current literature of the day, such as stories written by one Seton-Thompson, describing the habits and customs of wild animals of North America.

"The said selections from the Bible were repeated without comment, and no songs of any sort were sung.

"Said general exercises comprised nothing other than the repeating said passages from the Bible and the reading of said story." (Rec., pp. 111 and 112.)

The words "of a religious character and a form of worship" are conclusions, and are denied. The singing of religious songs stands denied. The things done being set forth, it is obviously for the court to judge of their character; so that there was practically no issue raised here except as to the singing of songs, and except that the writ alleges generally the reading of the Bible and the offering of prayer, whereas the answer sets up merely the repeating of certain passages from the Bible.

"That the only general exercises during which said Philip Billard had not refrained from study were the said religious exercises, as you well knew, and that your said resolution required him to promise to refrain from study during said religious exercises, which are conducted during school hours, as a condition of being ever again allowed to enjoy the privileges of said school, the conscientious views of said J. B. Billard and the said Philip Billard to the contrary notwithstanding, and said resolution was by you so understood, meant and intended." (Rec., p. 106.)

This is by the answer denied to the following extent: That precisely what occurred during said general exercises (which are not admitted to be religious exercises) is set up, and it is charged generally that the child refused to refrain from study during the whole of said general exercises, and that the said exercises "occupied altogether fifteen minutes of time from 9 A. M. to 9:15 A. M., and invariably preceded the regular and ordinary studies and instruction of the curriculum." (Rec., p. 112.)

It is also averred in the answer, "that said resolution

required him to promise to refrain from study during said general exercises whenever he was present, as a condition of being allowed to enjoy the privileges of said school, and said resolution was so meant and intended." (Rec., p. 114.)

It will thus be seen that the issues of fact raised by the pleadings were very few indeed. All the averments of pure fact were admitted except as to what the general exercises consisted of. The singing of songs was denied, and the passages of Scripture which were repeated were specially designated.

The answer states, in addition to the statement of what occurred at the general exercises, which has already been set out, the following new matter:

"That on January 9, 1902, the principal of said school, by authority of said board, suspended the said Philip Billard from the privileges of said school for reasons stated in a certain letter written and signed by said principal and transmitted by said principal to J. B. Billard, and received by J. B. Billard on said 9th day of January, 1902, a true copy of which letter is as follows:

"'MR. J. B. BILLARD: I have this day suspended Master Philip Billard from the privileges of this school for refusing to obey the order of the Board of Education of this city—namely: that during all general exercises pupils shall refrain from work and be in order, subject to the direction of the teacher.

"'Respectfully,

"'W. H. WRIGHT,

"'Principal.'

"Further answering, defendant avers that on said January 9, 1902, it was and theretofore had been, and still is, the rule duly adopted and promulgated by the Board, that

'all pupils in the Topeka public schools shall refrain from pursuing their studies during all general exercises of the schools, and that at such exercises they shall conduct themselves in as quiet and in as orderly a manner as they are required to do during any other of the school exercises.'

"Further answering, defendant says that on the said 9th day of January, 1902, the said Philip Billard, *being voluntarily present during said general exercises,* refused to obey said rule and order of the Board that all pupils present should refrain from study during said general exercises, in this, that he persisted, contrary to said rule and request of the teacher and order of the Board, in pursuing his regular and ordinary studies during said exercises, and for that purpose in using and handling his books, tablet and pencils." (Rec., p. 111.)

"Defendant further says, that the said city of Topeka is a city of the first class, and the said defendant is by law fully authorized and empowered in its discretion to make all rules for the government of said schools of said city which seem to it necessary, wise, useful, and salutary, subject always to the constitution and laws of the State; and this defendant avers that the said general exercises so conducted were in the judgment of the Board wise, salutary and useful to the pupils and necessary for their nurture and admonition, and not contrary to the laws or to the constitution, and well adapted to promote the moral and intellectual welfare of the pupils." (Rec., p. 112.)

"That said Philip Billard and said J. B. Billard well knew that the rule of the Board forbade pupils from studying during said general exercises; but defendant admits that defendant and the said principal were at the time aware that said J. B. Billard had instructed his said son to violate said rule; and said defendant admits that said J. B. Billard had theretofore informed the Board that he was conscientiously opposed to said son participating in

said exercises; *but this defendant avers that said Philip Billard was voluntarily present at the said exercises, and had theretofore received permission, as he and the said J. B. Billard well knew, to absent himself from the said general exercises if the said J. B. Billard so advised and directed.*" (Rec., p. 113.)

It will be seen, therefore, that the *only issue of fact as between the writ and the return was as to what occurred at the general exercises. Plaintiff's proof should have been confined to this issue.*

The new matter in the return which by statute stood denied raised an issue as to whether plaintiff's son was voluntarily present at the exercises or not, and as to whether or not he had theretofore received permission to absent himself from the exercises. These were the only issues so raised.

THE IMMATERIAL EVIDENCE.

We have shown that if pleadings have any office whatever in a lawsuit, plaintiff's evidence in chief should have been confined to the one issue as to what occurred at the general exercises. All other evidence was incompetent.

Plaintiff was, however, allowed to introduce in evidence, over defendant's objection and exception, a petition presented by the Ministerial Union to the Board of Education, and evidence showing what occurred at the meeting of the Board at which this petition was presented.

This evidence was absolutely incompetent and immaterial for several reasons.

It did not prove or tend to prove any issue under the pleadings. There was no possible issue under which this evidence could be held to be admissible. In order to get this case fairly before the court we had admitted everything pleaded by plaintiff except his allegations regarding what the general exercises consisted of and what occurred during the general exercises, and his proof should have been confined to this issue.

This evidence could not have been made admissible under any issues that could possibly have been framed in this case. At most it could only show the motives and personal prejudices of a very small proportion of the members of the Board in adopting the orders and resolutions which were adopted; and it is well settled that motives are absolutely immaterial in legislation of any kind. If the legislation is proper on its face, the motive with which it was adopted is immaterial.

City v. Burleigh, 36 Kan. 34.

Orders are to the Board of Education what *ordinances* are to the City Council and *statutes* to the Legislature. The motives of a legislative body or its individual members in passing any legislation are absolutely immaterial.

In *Kountze v. Omaha,* 5 Dill. 443, Mr. Justice Dillon said:

"It is inadmissible to institute a judicial inquiry into the intentions or motives of legislators in the enactment of a statute and to make the validity of the enactment depend upon the result of such an examination."

The petition of the Ministerial Union was and is wholly irrelevant. The question to be determined is whether this teacher in repeating the Twenty-third Psalm and the Lord's Prayer in the presence of the pupils, violated the child's conscience and constitutional right. She had been doing this for a year before the Ministerial Union took any action, and she did nothing other than this after the Ministerial Union took its action. The only dispute or controversy under the *pleadings* was as to whether religious songs were sung. Under the *evidence* it is undisputed that such songs were not sung. The ceremony was the same before the 2d of December, when this petition was presented, that it was after. If Miss Brown was right before, she was right after. If she was wrong before, she was wrong after. If she violated the child's conscience and constitutional right afterward, she violated it before, and if she did not violate such right before, she did not violate it after. Neither the petition of the Ministerial Union nor the remarks of the members of the Board nor the resolutions of the Board nor any of the actions of the Board, save its approval of the action of Miss Brown and of Mr. Wright, has any relevancy to the controversy whatever.

Whether the acts done by Miss Brown were unlawful or not is a question purely for the court. There is no controversy, so far as the evidence is concerned, as to what those acts were. The court is simply to lay those acts

alongside of the law and the Constitution and by the law and the Constitution to measure them.

It was suggested on the trial that the petition of the Union might help the court to determine whether the exercises were religious or otherwise. This is purely a question for the court. It is not a question for expert evidence; and if it were a question for expert evidence, the only way to get such evidence would be to call the members of the Union as experts.

What two or three out of twelve members of the Board said in discussing the resolution is also entirely immaterial. It was first proposed that teachers be required to read the Bible in the public schools. According to the debate, two members favored it and two were against it. On account of the opposition the resolution was not adopted as offered, because presumably it would not have had the votes to pass. It was adopted as amended, because presumably that suited the views of a majority of the Board. The word "recommend" is not synonymous with "command" or "direct"; especially is this so when the record says "command" or "direct" were cut out and the word "recommend" substituted. But the whole proceeding as evidence in this case is irrelevant. *If it is constitutional to read the Bible in the schools under the circumstances as shown here, it remains constitutional whether the Board recommends it or requires it or says nothing about it. If it is unconstitutional to read the Bible in the schools, it is*

still unconstitutional no matter what action the Board may have taken.

We have referred to this evidence regarding the petition of the Ministerial Union and the action of the Board upon it at this point, for the reason that we intend to eliminate it from the case, so far at least as this brief is concerned.

Counsel have devoted fully one-half of their brief to the attempted refutation of the statements made in the petition of the Ministerial Union, without connecting defendant with it in any way.

They have repeatedly asserted in their brief that defendant had taken and would take the position indicated by the petition to be the position of the Ministerial Union, but these assertions are absolutely without support in the record or elsewhere. In fact, counsel throughout their brief have without right repeatedly stated what defendant's position was. We hereby repudiate all such positions as are in conflict with this brief.

Counsel have spent many pages of their brief in crying "bigotry," "intolerance," "sectarianism," "self-sufficiency," and "ignorance," at the Ministerial Union. In fact, counsel find so much enjoyment in this as to lead us to wonder if the petition of the Ministerial Union was not introduced for no other reason than to permit them to so abuse that body. We do not think that that body needs any defense, and we do not consider it to be our duty to

make any defense for it. This action is against the Board of Education and not against the Ministerial Union, and in the subsequent portions of this brief we shall confine our argument to matters in which the defendant is interested.

THE MATERIAL FACTS.

The statement of facts by counsel for plaintiff in error consists chiefly of a statement of the *immaterial* facts—the petition of the Ministerial Union and the informal discussion of it by a few of the members of the Board. It is therefore necessary for us to state the *material* facts shown by the evidence.

It was admitted on the trial below that—

"During the year 1859, prior thereto and for many years thereafter it was customary in Kansas to open the public schools by reading and repeating passages of Scriptures." (Rec., p. 115.)

Prof. Davidson testified that he had lived in Kansas since 1866, and had been connected with the Kansas public schools as pupil, teacher or superintendent since 1869, and with the Topeka schools as principal or superintendent since 1888. (Rec., p. 150.)

He testified:

"Q. I will ask you whether or not, since you have known anything about the public schools of the State of Kansas, it has been the custom to read portions of the Scripture during the general exercises in the morning? A. So far as it has come under my observation, either as pupil, teacher,

principal, or superintendent, it has been the prevailing custom." (Rec., p. 150.)

This practice as now observed had obtained in the Topeka schools during all of the time of Prof. Davidson's connection with them. (Rec., p. 162.)

Educators generally recognize the value of some sort of general exercises in which all of the pupils participate at the beginning of each session, in order to reduce the pupils to a state of harmony and quiet and to produce transition from play to work, and such exercises are employed almost universally throughout the country for this purpose. (Rec., p. 170.)

In the grade to which plaintiff's son was assigned the exercise for this purpose at the beginning of the afternoon session was the general singing lesson. (Rec., p. 139.) The teacher, Miss Brown, testified that the general exercises in the morning had been the same throughout the year, both before and after the action of the Board complained of here, and that they were as follows:

"Q. I wish you would state what those general exercises consisted of, say from September, 1901, to January, 1902? A. They consisted of repeating the Lord's Prayer and Twenty-third Psalm. Those two occupied about three minutes, and the remainder of the fifteen minutes I read some story or portions of stories to the children from such books as Ernest Seton-Thompson's books, or books of that character.

Q. Take the term before that—what did your general exercises consist of? A. Very much the same.

Q. *Was there any particular attitude that the pupils were required to assume, or position, while you were repeating those things?* A. *They were required to assume the same position as in any other recitation—sit erect and in a comfortable position.*

Q. *Did you require the children to repeat either of those things, the Lord's Prayer or the Twenty-third Psalm, with you?* A. *I did not.*

Q. Did some of them repeat it with you? A. They did.

Q. Did all of them? A. They did not; I frequently noticed that some did not.

Q. *When you noticed that they did not, you said nothing to them?* A. *I said nothing.*

Q. Now is that all the general exercises embraced? A. That was all.

Q. You heard what Philip said about having some singing during those mornings generally? A. I did.

Q. What do you say about there being any singing during those mornings? A. Our regular music recitation comes in the afternoon, from 2:00 to 2:15. It often happens with music, as with anything else—not often, but once in a great while—that the order of the program might be changed, and might possibly be that music might come after the opening exercises. But the only music we have in my room is our general music lesson." (Rec., pp. 138, 139.)

On cross-examination Miss Brown testified:

"Q. You say you may have had this hymn sung sometimes? A. I may have had a regular music lesson after the general exercises.

Q. Immediately after? A. It may have been.

Q. And it may have been this hymn? A. It may have been that hymn." (Rec., p. 141.)

"Q. Now every morning, though, you repeated the

Twenty-third Psalm and the Lord's Prayer? A. Practically every morning.

Q. That was your habit? A. Yes, sir.

Q. By whose direction did you do that? A. It was always my custom to do that; I never was directed by anybody to do that.

Q. Well, you remember when the School Board took action about it with respect to Philip Billard, don't you? A. Yes, sir.

Q. After that you acted, I suppose, under that direction? You received that direction? A. I received that direction.

Q. It was simply your own act, then, before that, was it? A. I simply followed the custom of the times to do that.

Q. The custom everywhere? A. As far as I know—yes, sir.

Q. What was the purpose of repeating the Lord's Prayer? A. It is necessary to have some general exercise after the children come in from the play-ground, to prepare them for their work. You need some general exercise to quiet them down." (Rec., p. 142.)

The song referred to is the "Morning Hymn" printed at pages 48, 49 of plaintiff's brief.

This testimony is nowhere contradicted. The only witness who testified on behalf of plaintiff regarding the general exercises was Philip Billard himself. He testified as follows:

"Q. Now I will ask you whether on that occasion there was any singing? A. There was sometimes.

Q. *How often would there be singing of hymns, if they were hymns?* A. *Not very often.*

Q. Were there sometimes? A. Yes, sir.

[Witness here points out song above referred to as one that was sung "about the time he last went to school."]

Q. Now at the time when this hymn was sung, and when other hymns were sung, if they were, was there any reading from the Bible? A. No, sir.

Q. Not at this time? Any prayer? A. Yes, sir."

(Rec., pp. 133, 134.)

This was all the witness testified to regarding this on direct examination. Counsel endeavored to prove something regarding some other songs that had been sung a year or so before by another teacher, but this evidence was of course excluded. (Rec., p. 134.)

On cross-examination Philip Billard testified:

"Q. Now they did not sing any hymn the last morning you were at school, did they, during these general exercises? A. No, sir.

Q. And they did not sing this hymn during the morning at all, did they—that is, this 'Morning Hymn' you showed Mr. Overmyer? A. Yes, sir.

Q. Was not that sung in the afternoon? A. No, sir.

Q. Are you sure about that? A. Yes, sir.

Q. You think this was sung—how long before you stopped going to school do you think it was? A. I can't remember.

Q. Well, it was a week before, wasn't it? A. Yes, sir.

Q. As much as that. And you think this was sung in the morning? A. Yes, sir.

Q. Some morning at least a week before you stopped going to school? A. Well, I don't know; I don't think so.

Q. Well, it was several days before that last day—you are sure of that? A. Yes, sir.

Q. You did not always sing in the morning during the general exercises, did you? A. No, sir.

Q. Now this book is called the 'Normal Music Course,' and contains all kinds of songs, don't it? A. Yes, sir.

Q. Were not your singing lessons in the afternoon? A. Yes, sir.

Q. And you used this book in the afternoon, didn't you? A. Yes, sir.

Q. Now from September to January, how often did you sing in the morning at all during these general exercises? A. How many times each morning?

Q. How many days—on how many days from September down to January, in all that time how many days did they sing anything at all during the general exercises in the morning? A. I don't know.

Q. Do you remember more than this once? A. Yes, sir.

Q. Would it be more than four times? A. Yes, sir.

Q. Would it be as often as once a month? A. Yes, sir.

Q. *Would it be as often as once a week?* A. *I can't remember.*

Q. You will not be sure about that? A. No, sir."

(Rec., pp. 135, 136.)

This is the testimony as to what the general exercises consisted of. It is uncontradicted that the Lord's Prayer and the Twenty-third Psalm were repeated and that animal stories were read every morning as general exercises.

It is uncontradicted that the singing was not a part of the general exercises; that there was no singing but the regular singing lesson, and that the regular time for that was in the afternoon, but that occasionally it may have followed the general exercises in the morning; *but this did not occur on any of the mornings over which there is any controversy.*

This is uncontradicted. The singing was not a part of the general exercises (and there is no complaint in

the writ except as to what occurred during these exercises), and it did not occur on the mornings on which the boy refused to obey the order of the Board. It is entirely immaterial what was done on other mornings. The question here is, "Was Philip Billard justified in refusing to obey the order of the Board requiring him to refrain from study during the general exercises on January 9, 1902?" There is no question here as to what his rights might have been a week before if he had then disobeyed the order of the Board. This action is an action of mandamus, and plaintiff must recover, if at all, upon a clear, uncontrovertible legal right. He cannot recover upon a right which he might have had if circumstances had been different.

The "Morning Hymn" is therefore entirely eliminated from the facts to be considered by the court. Before dismissing the subject, however, we wish to call the attention of the court to the fact that the song is from a book (Exhibit A) prepared expressly for the purpose of teaching singing in "Intermediate and Grammar Schools." It is "a series of exercises, studies, and songs defining and illustrating the art of sight-reading; progressively arranged from the first conception and production of tones to the most advanced choral practice." So far as we have been able to observe, the songs are generally harmless. It is true that the song objected to contained a reference to the Lord, capitalized, and to "heavenly light." This is the only evidence we have been able to find in the book of the work of

"a horde of sterilized, despiritualized, materialized sectarians pushing like ravenous swine and trampling under their unhallowed feet the 'pearl of great price,' the human conscience," or of an attempt to "persecute, crucify, stunt, and paralyze the whole human race." (Plaintiff's brief, p. 113.) If this song is unfit for the public schools, then must our national air "America" ("My Country, 'tis of Thee") be excluded from the schools because it contains the lines:

"Our Father's God, to Thee,
Author of Liberty,
To Thee we sing."

Plaintiff's son had been in Miss Brown's room not only since the preceding September, but during the term preceding that month. (Rec., p. 135.) During that time, and until and including the time when the boy left school, the general exercises had been as shown above, and there had been no objection from plaintiff until December, 1901, when, on account of the presentation of the petition of the Ministerial Union to the Board (Rec., pp. 159, 172), and not on account of any change in the general exercises, for there was none (Rec., p. 149), plaintiff for the first time objected.

The following testimony as to what then occurred is absolutely uncontradicted. In fact, there is no other testimony on the subject in the record.

Prof. Davidson, the Superintendent of Schools, testified as follows:

"Q. This difficulty about Philip Billard and the morning exercises, general exercises in the morning, officially came to your attention as Superintendent of Schools? A. Yes, sir.

Q. I wish you would state just how it was brought to your attention, and its history so far as you were officially connected with it. A. In December, 1901, the case came up to me by reference from Mr. Wright, the principal of Quincy street school. At Mr. Wright's suggestion Mr. Billard called on me and asked at the time that his boy be permitted to continue in the Topeka public schools, and that he should be permitted to either pursue his studies during what is designated the opening or general-exercise period in the morning, or that he be excused from attending school in the morning during the period of such exercises. I told him I could not grant his first request. *I did grant his second request, that the boy could continue in school and be excused from school during the opening-exercise period in the morning, coming to school immediately after that period.* I stated to him that not having full powers in the matter, I should consider it as temporary, but that the arrangement would perhaps continue as permanent; at least he could so consider it unless he heard from me otherwise.

Q. Did he ever hear from you otherwise—that is, withdrawing the permission? A. I never withdrew the permission. He did not hear from me. That plan obtained from the time my attention was called to the case in December until the close of school at the Christmas holidays for 1901. I think on the Saturday preceding the reopening of school, which would be January 4th, Mr. Billard communicated with me by 'phone and asked whether or not the plan was to be continued. I informed him that it could be, but he

then said that he did not wish to avail himself of that as an option; that he insisted that the boy be permitted to go to school during the opening-exercise period in the morning and pursue his studies during that period. I told him the Board of Education would have a meeting soon, on the following Monday night, January 6th, and that I would grant his request temporarily until the Board had taken action thereon, and that that temporary arrangement would hold until he was otherwise notified. The Board of Education held a meeting on the evening of January 6th. I reported the first arrangement to the Board, and also this second temporary arrangement, and asked for instructions. The Board then made the ruling which required that when pupils are in attendance upon the general exercises in school they shall deport themselves in as orderly a manner as when in attendance upon any other of the school exercises. On either the 7th or 8th I called on Mr. Billard personally at his office and communicated to him the action of the Board, stating that it would be impossible for me to continue, under this instruction from the Board, the temporary arrangement granted on the Saturday preceding the opening of schools. He insisted that he would send the boy to school and give him instructions to pursue his studies during the general-exercise period. I told him if he did so the ruling of the Board would be applied, and the suspension of the boy would necessarily follow under that rule of the Board. I then notified Mr. Wright, whom I had communicated all my action to, that the temporary arrangement granting Philip Billard permission to attend school during the opening-exercise period and continue his study at that time was canceled, and that his parent had been so notified, and that any breach of the rule at any time would be acted upon by him as under any similar case of disorder arising which would likely come under his notice. I also should add that on the 8th I communicated

to the schools a general circular, which I believe has been read here by one of the attorneys, a circular which set forth the attitude of the school authorities on the question of the opening exercises as under discussion at the time. On the morning of the 9th I received a letter from Mr. Wright, stating that Philip Billard had been suspended under the rule mentioned, requiring him to be in order during any general exercise of the school; and with that notification I think my relations to the case ceased. The next move in the case, I believe, was appealed directly to the Board, asking that Master Billard be reinstated to his place in the school.

Q. This permission that the child absent himself during the general exercises was never withdrawn? A. No, sir. It still holds, if he wishes to avail himself of it."

(Rec., pp. 150, 151, 152.)

As to what occurred on the last morning that the boy attended school, Miss Brown, the teacher, testified as follows:

"Q. Do you remember the last morning when Philip Billard was at school? A. I do.

Q. I wish you would state what occurred; what he said and did, and what you said and did. What was said by you and by him with reference to his conduct? A. I asked him out in the hall. The last morning?

Q. I am talking now about the last morning when he was present during the general exercises. State what happened, from the beginning of that morning. A. You mean on the 9th of January?

Q. If that was the last morning he was there. A. That was the last morning. It was the custom in cold weather in our building to allow the children to come in early in their rooms on account of the cold weather, and the pupils

to use their books to study, and at the opening of school they are asked to lay aside their books and sit in orderly position, and Philip refused to do this; and more than that, he disturbed the room by tearing paper and such things as that, and I asked him to step out in the hall. I referred him to Mr. Wright.

Q. He continued to use his books? A. *He continued to use his books and tablets and pencils and make a noise—was very obnoxious.*

Q. What was his manner? A. *A very defiant manner.*

Q. This question of whether he should study or use his books during that period had been up before, hadn't it? A. It had.

Q. Then you asked him to step out into the hall? A. Yes, sir, and told him the orders, the instructions I had received regarding that, and he refused to comply with the request.

Q. Now state whether or not prior to this he had been excused from attending the general exercises. A. He had, before the holidays. He objected, and I referred him to Mr. Wright, and I believe Mr. Davidson excused him from attending; he came in ten minutes after nine.

Q. He had orders that he might be absent during that time? A. He had orders from Mr. Davidson that he might be allowed to come in ten minutes late.

Q. He came back voluntarily and resumed attendance during general exercises voluntarily? A. He did.

Q. It was not by any direction or command of yours? A. None at all.

Q. You understood he had permission to be absent from these general exercises at all times? A. I did."

(Rec., pp. 140, 141.)

On cross-examination the same witness testified as follows:

"Q. Now the morning you speak of, did Philip come

in before the children took their position in order to hear the morning service? A. Yes, sir.

Q. And was there when it commenced. A. Yes, sir.

Q. He was not guilty of any breach of decorum before the service commenced, was he? A. No, sir.

Q. And when it commenced he simply busied himself about his books and papers, what he had on his desk that was proper for him to have there as a pupil? A. Well, no.

Q. What did he do? A. He tore paper and disturbed the room.

Q. How much paper did he tear? A. He tore one sheet, but he tore it more than once.

Q. Do you know what that paper was, or what he was tearing it for? A. It was a blank piece of tablet paper.

Q. That was not a very noisy or uproarious proceeding, was it? A. It was quite noisy, much more noisy than need to be.

Q. What was going on while he did that? A. We were having our general exercises in the morning.

Q. What part of the general exercises? A. Well, I don't remember whether it was the Lord's Prayer, or the Psalm, or the story.

Q. It was what was known as your religious exercises, the Lord's Prayer or the Psalm, that was happening, wasn't it? A. I don't remember whether it was during that time or during the story.

Q. You knew the whole controversy between Mr. Billard and the school authorities was as to the so-called religious services in the morning? A. I did.

Q. And it was because of your understanding that he had disregarded that and had been defiant of it that you turned him over to the principal, wasn't it? A. It was.

Q. There was not enough in his conduct to have been an infraction of the ordinary discipline of the school during other hours and to cause you to turn him over to the prin-

cipal? A. This same act during other hours would have been cause to do so.

Q. But it was because it happened during the time you were having that service that you turned him over to the principal? A. It was because he committed the act, not because it was in the morning.

Q. Do you turn over a pupil to the principal who tears paper during ordinary study hours and makes a little noise like that? A. I turn over to the principal a pupil that don't obey the rules.

Q. You do that in every instance? A. If they don't promise me to do differently.

Q. When you took him out in the hall you had a talk with him? A. Yes, sir.

Q. What did you say to him? A. I asked him if he would go in and obey the rules of the school.

Q. What rules? A. All the rules of the school."

(Rec., pp. 143, 144, 145.)

"Q. Then what was the day at which this transaction took place, when you finally turned him over to the principal? A. The 9th of January.

Q. Now had those things happened from the time he returned down to the 9th of January? A. They did; each morning he was a little worse than the morning preceding.

Q. And it was during the time you would be saying the Psalm or the Lord's Prayer that this difficulty would commence? A. No, sir, not always. I remember some of the mornings it was in the reading, and all day long; he began in the morning.

Q. Well, you didn't make any claim when you turned him over to the principal on the score of any bad behavior during the days that had passed, or anything of that kind? A. I did.

Q. Then he was not turned out of school on account of

the difficulty about religion? Is that your claim? A. My claim is that the morning exercises got him out of humor for the day.

Q. But there was the controversy. It arose over the morning exercises, and over the religious part of the morning exercises, didn't it? A. It arose over the morning exercises.

Q. Can't you answer completely the question? I ask you if it did not arise over the religious part of the morning exercises? A. I stated that some of these mornings he was just as bad during the reading of the story.

Q. The defiance always commenced with him during those religious exercises? A. The defiance commenced with nine o'clock."

(*Redirect-Examination.*)

"Q. In order to get this clear, you did not require him to come back on the 6th of January, after the holidays, to come to school at nine o'clock, did you? A. No, sir.

Q. He came in voluntarily? A. Yes, sir.

Q. The school session was resumed on the 6th of January, and if I understand you correctly he manifested this defiance, defiant disposition, and refused to lay aside his books from the very beginning, that is, the 6th, 7th, 8th and 9th of January? A. He did.

Q. What did you say on the morning of the 6th when you observed he did not lay aside his books as the other children did? A. I think I said nothing.

Q. Now, on the morning of the 7th, when you discovered he did not lay aside his books as the other pupils did, what did you say to him? A. I said nothing .

Q. Did you say anything to him on the morning of the 8th when this thing happened? A. I don't believe I did on the 8th.

Q. Did you ever tell him what the rule was, or did he know that it was the rule to lay aside his books during

those exercises? A. I did that at the beginning of the controversy, and when he returned I did not say anything to him until I received instructions from the Board of Education.

Q. Prior to this, prior to the time when he was excused from the morning exercises, this question came up whether he should lay aside his books during the morning exercises? A. Yes, sir.

Q. And you had told him that he must? A. Yes, sir."

(Rec., pp. 147, 148.)

"Q. After the Board recommended the use of the Lord's Prayer at the opening exercises, did you make any change in your general exercises? A. I did not.

Q. You say that you think that there might have been singing sometimes after the general exercises. How often do you think that could have happened from September to January, that you sung in the morning? A. It might have been more than two or three times, but I don't remember of it.

Q. The singing lesson came as a regular order in the afternoon? A. Yes, sir." (Rec., p. 149.)

Mr. Wright, the principal of the school, testified that the boy came to him on January 9, 1902, and said that Miss Brown had sent him because he had gone on with his work during general exercises. He was suspended, and a note sent to his father. (Rec., p. 177.)

"Q. Did you ask him whether he would promise to obey that rule hereafter? A. I am not quite sure whether I did or not, but I asked him if he refused to do it, and he said he did.

Q. Did he continue the refusal then and there; that is, did he say he had refused, or did he refuse when he was talking to you? A. I don't remember just the words used.

My recollection is that I asked him if he refused to obey Miss Brown, and I meant that in the present tense, 'Do you refuse,' and he said 'Yes, sir.' He may have added that his father told him to." (Rec., p. 177.)

The above is, as we have said, all the evidence on the subject in the record, and is therefore uncontradicted. The story, as told by the witnesses, and stripped of the typographical and syntactical pyrotechnics of counsel for plaintiff in error, is a very simple and ordinary one. For at least a year plaintiff's son had been present at these exercises without objection. Then, because the Ministerial Union recommended them and because a clever newspaper man made a good story out of it, plaintiff found that "a horde of sterilized, despiritualized, materialized sectarians were trampling under their unhallowed feet that pearl of great price, his conscience." He began making demands, and kept making them stronger and stronger, until finally in justice to others they had to be refused. His son was permitted to attend school and take no part in the exercises, and he was permitted to stay away from the exercises and come to school at their close; but he was not permitted to attend the exercises and disturb all of the other pupils.

Counsel, in their brief, indulged in a great deal of lurid rhetoric and much unpleasant innuendo over the question of what was and what was not compulsory. It seems to us that there was no occasion for this. It is admitted that the general exercises were held with the consent of defendant,

and that defendant ratified all that was done. It is admitted that when the boy was present he was compelled to refrain from study; but there is not one word of evidence in the record which tends in any way to show that he was compelled to be present—all the testimony in the record shows the contrary.

PLAINTIFF HAS MISTAKEN HIS REMEDY.

The command of the writ—the prayer of the petition—is as follows:

"Now, therefore, these are to command you that immediately upon the receipt of this writ you do reinstate the said Philip Billard in all his privileges as a pupil of said school, without exacting from him or from the said J. B. Billard any promise that said Philip Billard shall refrain from study during said religious exercises, or hereafter enforcing any rule requiring him so to do, or that you show cause," etc. (Rec., p. 106.)

All that the writ commands—the only relief asked—is that the boy be permitted to return to school without promising to refrain from study during that period of the day when certain exercises are going on—that is, that he be permitted to study during that period.

It is true that that period is identified by what plaintiff calls the religious exercises, but so far as the writ is concerned those exercises are of no importance except to so identify the period when plaintiff wishes the boy to be allowed to study. There is no prayer that defendant be

required to terminate the exercises; that relief could certainly not be granted in mandamus.

The only relief prayed for is, therefore, that the boy be permitted to pursue his studies during this period; and the question here is, Will the court, in an action of mandamus, take the management of the schools from the school officers and say that this pupil may study at such-and-such a time, and this one need not study as such a time, and that the other one need not obey the orders of the school officials during such a period? We submit that the court will not do this. The control of the schools is vested absolutely in the Board of Education.

"*The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of said city* under its charge and control, and of said board, subject to the provisions of this act and the laws of this State." (Sec. 6290, Gen. Stat. 1901.)

The teachers, principals and superintendent are charged with the duty of maintaining order. Even if the exercises complained of can be held to be unauthorized, the Board does not for that reason lose its power to make and enforce rules of order while such exercises are going on, nor is the teacher absolved from the duty to maintain order. The court in a proper action may prevent the holding of objectionable exercises, but it will not attempt the government of the school while such exercises are going on.

If the exercises can by any possibility be held to be objectionable, let the court stop them in a proper action;

but until they are stopped let the proper school officers look after the details of school management and government, not only during the objectionable exercises but at all other times.

There is still another reason why mandamus is not the proper remedy.

"The writ of mandamus being justly regarded as one of the highest writs known to our system of jurisprudence, *it only issues when there is a clear and specific legal right to be enforced* or a duty that ought to be and can be performed, and where there is no other specific and adequate legal remedy. *The right which it is sought to protect must therefore be clearly established, and the writ is never granted in doubtful cases. And the person seeking the relief must show a clear, legal right to have the thing sought by it done,* and done in the manner and by the person sought to be coerced."

High Extraordinary Legal Remedies, § 9.

"An important feature of the writ of mandamus and one which distinguishes it from many other remedial writs, is that it is used merely to compel action and coerce the performance of a preëxisting duty. In no case does it have the effect of creating any new authority or of conferring power which did not previously exist, its proper function being to set in motion and to compel action with reference to previously existing and clearly defined duties. *It is therefore in no sense a creative remedy, and is only used to compel persons to act where it is their plain duty to act without its agency.*"

Id., § 27.

"The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus are such acts only as are in their nature strictly ministe-

rial; *and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.*"

Martin v. Ingham, 38 Kan. 641, quoted and approved in *Householder v. Morrill*, 55 Kan. 317, 319.

"While, as we have thus seen, the courts are inclined to a somewhat liberal exercise of their jurisdiction by mandamus for the purpose of coercing the performance of duties obligatory upon municipal corporations and their officers, they yet refuse to trespass upon the limits of official discretion, and the principle applies with peculiar force to this class of cases, that *mandamus will not lie to control the discretion of officers intrusted with the power of determining any practical matter.*"

High on Extraordinary Legal Remedies, § 325.

The Board of Education has power to make rules which *in its discretion* it considers necessary for the government of schools. (§ 6290, Gen. Stat. 1901.) It may in its discretion require or permit the reading of the Bible (§ 6284, Gen. Stat. 1901), and it may of course in its discretion prescribe the manner in which the Bible may be used. If through an abuse of that discretion the Bible is improperly used, if that be possible, the remedy is not in mandamus. As we have seen, mandamus will never lie to control the exercise of discretion nor to correct the abuse of discretion.

St. Louis R. R. Co. v. Shinn, 60 Kan. 111.

If, to extend the same line of argument, the peremptory writ be allowed, then it must command that the boy be permitted to pursue his studies while the Bible is used in one way but not while it is used in another. The court must *create* rights, and this it may not do in mandamus. There is no clear and specific legal right to be enforced. The court, if it granted the peremptory writ, would have to recognize the finest possible shades of distinction. There is but one case in the books that holds that the Bible is a sectarian document (*State v. Dist.*, 44 N. W. [Wis.] 975), and that case holds that "there is much in the Bible which cannot be justly characterized as sectarian." If the court should by any chance follow this case, it would be compelled to state in its writ what portion of the Bible might be read and what might not. The only other case in the books that holds even that the Bible may under some circumstances accomplish a sectarian purpose is *State v. Scheve,* 93 N. W. 169, where the court says:

"That sectarian instruction may be given by the *frequent reading,* without note or comment, of *judiciously selected passages,* is, of course, obvious."

If by any chance the court should follow this case it would have to define what passages would by frequent reading give sectarian instruction and how often they would have to be read to accomplish that result. It would have to create the right which it protected. But mandamus is not and cannot be a creative remedy. It is purely a pro-

tective remedy, and protects only clearly established specific legal rights. In mandamus the courts will not draw fine distinctions between the proper exercise and the abuse of discretion.

We submit, therefore, that whatever rights plaintiff may have cannot be enforced in this action.

ON THE MERITS.

We submit that even if plaintiff can be held to be entitled to relief, he cannot obtain it in an action of mandamus; we submit that the attendance of plaintiff's son upon the exercises in question was entirely voluntary on the part of both plaintiff and his son; we submit that the order of the board which plaintiff objects to is clearly within the power of the board; we submit that the motives of the individual members of the board in making that order are entirely immaterial; and we submit that the evidence regarding the action of the Ministerial Union has no place in the record and is absolutely immaterial. But beyond all this, we submit that even if the attendance of plaintiff's son had been compulsory—even if the general exercises in question could with any show of reason be called religious exercises—still no right of plaintiff or of his son was violated and no constitutional or statutory provision was disregarded.

THE CONSTITUTION AND THE STATUTES.

The provisions of the Constitution upon which plaintiff relies are the following:

"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship.

"No religious test or property qualification shall be required for any office of public trust nor for any vote at any election; nor shall any person be incompetent to testify on account of religious belief." (Sec. 7, Bill of Rights, § 89, Gen. Stat. 1901.)

"No religious sect or sects shall ever control any part of the common school or university funds of the State." (Const., par. 8, art. 6.)

"No sectarian or religious doctrine shall be taught or inculcated in any of the public schools of the city; but nothing in this section shall be construed to prohibit the reading of the Holy Scriptures." (Par. 6284, Gen. Stat. 1901.)

The constitutional provisions above quoted do not by any means appear for the first time in our own Constitution; they are as old as the country itself. For a thorough understanding of them it is necessary for the court to consider the history of the times when they were adopted; the habits and beliefs of the people who adopted them; their meaning when first adopted; the circumstances under which they were incorporated into our Constitution; and the construction given them at the time of their adoption

and by the very men who, as members of the Constitutional Convention, were instrumental in causing their adoption.

Early History.

It is, of course, common knowledge that the colonies were settled by those who had fled from England and Europe to avoid religious persecution.

"That religious intolerance which imposed itself through parliamentary enactments and judicial sentences, and which procured the law to anathematize differing creeds as 'superstition' or 'heresy' according as Catholic or Protestant gained governmental ascendency, *was more than anything else what our ancestors fled from.*"

Harrison v. Brophy, 59 Kan. 1.

They fled, not because they did not wish to worship God at all, but because they wished to worship God "according to the dictates of their own consciences." From the very earliest times, therefore, the people of the colonies were a religious people,—a people whose religion had been so strong as to cause them to leave their homes and settle in an unknown country, that they might worship God,—the God of the Bible, the "Jewish God Jehovah," to quote counsel for plaintiff in error—according to the dictates of their own consciences.

That the colonists had not up to the time of the separation from England lost this religious character, is shown by the report of the "Committee of Correspondence" entitled "The Rights of the Colonists." The "Committee of Correspondence" was the body that, as was said by Dr.

John Fiske (War of Independence, ch. 5) "fairly organized the Revolution." The report referred to was prepared by Samuel Adams under the following circumstances:

"The town records of Boston [Nov. 2, 1772] say:— 'It was then moved by Mr. Samuel Adams that a Committee of Correspondence be appointed, to consist of twenty-one persons, to state the rights of the Colonists and of this Province in particular as men and Christians and as subjects; and to communicate and publish the same to the several towns and to the world as the sense of this town, with the infringements and violations thereof that have been or from time to time may be made.' The motion occasioned some debate, and seems to have been carried late at night; the vote in its favor at last was nearly unanimous. . . .

"In the last days of 1772 the document having been printed was transmitted to those for whom it had been intended, producing at once an immense effect. The towns almost unanimously appointed similar committees; *from every quarter came replies in which the sentiments of Samuel Adams were echoed.* In the library of Bancroft is a volume of manuscripts. . . . They are the original replies sent by the Massachusetts towns to Samuel Adams' committee. . . . There is sometimes a noble scorn of the restraints of orthography, as of the despotism of Great Britain, in the work of the old town clerks, for they generally were secretaries of the committees; and once in a while a touch of Dogberry's quaintness, as the punctilious officials, though not always 'putting God first,' yet take pains that there shall be no mistake as to their piety by making every letter in the name of the Deity a rounded capital."

Hosmer, Life of Samuel Adams, ch. 13.

"The rights of the Colonists" may therefore be held to

express the sentiments of the colonists at the time of the breaking out of the Revolution. It contained the following:

"*As men.* . . . As neither reason requires nor religion permits the contrary, every man living in or out of a state of civil society has a *right peaceably and quietly to worship God according to the dictates of his conscience.* . . .

"*As Christians.* These may be best understood by reading and carefully studying the institutes of the great Lawgiver and head of the Christian Church, which are to be found clearly written and promulgated in the New Testament.

"By an act of the British Parliament, commonly called the Toleration Act, every subject in England except Papists, etc., was restored to and reëstablished in his *natural right to worship God according to the dictates of his own conscience.*"

1 Harper's Enc. of U. S. History, p. 55.

The foregoing shows not only that at the time of the Revolution the Colonists were an extremely religious people and a Christian people—that needed no proof—but it shows that the very language of our own Constitution—"right to worship God according to the dictates of conscience"—was used to define religious toleration as it existed at a time when there was universally a religious qualification for the right to vote or hold office, and when a failure to attend "meeting" was punishable by fine and imprisonment. The words quoted, therefore, did not mean and never have meant that non-sectarian Christianity and

morality shall never receive any incidental benefit, recognition or encouragement from the law; they simply meant that there should be no active persecution on account of religious belief or mode of worship.

The Declaration of Independence and the Federal Constitution.

When this people declared its independence of England it of course recognized the "Jewish God Jehovah."

"When in the course of human events it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's *God* entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation.

"We hold these truths to be self-evident: That all men are created equal; that they are endowed by their *Creator* with certain inalienable rights. . . .

"We, therefore, the representatives of the United States of America in general Congress assembled, appealing to the *Supreme Judge* of the world for the rectitude of our intentions," etc. . . .

"And for the support of this declaration, with a firm reliance on the protection of *Divine Providence,* we mutually pledge to each other our lives, our fortunes, and our *sacred* honor."

When the convention which formed the Federal Constitution met, nothing was accomplished for a long time.

"When finally every prospect of an understanding seemed to have disappeared, the white-haired Franklin

arose and proposed that henceforth the sessions should be opened with prayer, for now there was no hope of help except from heaven; the wit of man was exhausted."

1 Von Holst Const. Hist., ch. 1, p. 51.

In 1789 the first amendment to the Constitution was adopted in the following words:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Constitution itself contains no reference whatever to the Deity. According to Alexander Hamilton this was merely an oversight.

"It is said that the Rev. Dr. John Rogers, an eminent divine of the Presbyterian Church in New York city, inquired of Alexander Hamilton on his return from the convention why some suitable recognition of the Almighty had not been placed in the Constitution, and that the reply was, 'Indeed, Doctor, we forgot it.'"

Cornelison, Religion and Civil Gov't, p. 204.

Whether an oversight or not, the omission is of no significance, as the Constitution contains no bill of rights, where such a recognition would properly appear; it contains no declarations of any kind, or in fact anything except direct legislation by the people, and such a recognition would therefore be out of place in any part of it.

Story (Commentaries on the Constitution, § 1874), writing of the years 1789–1790, says:

"Probably at the time of the adoption of the Constitution and of the amendment to it now under consideration [First amendment] the general if not the universal senti-

ment in America was that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation."

As this author was admitted to the bar in 1801 and was in public office from 1804 to 1845, this statement must carry great weight.

Christianity and Free Government.

It is generally admitted that the government inaugurated by the adoption of the Federal Constitution could never have endured except in a Christian country and where the Christian religion was the religion of the people. *Christianity is necessary to free government. Without Christianity free government cannot exist.*

"The sturdy independence of the barons who at Runnymede compelled King John to sign *Magna Charta* has been the subject of eulogy in both song and story, but the principles of both are found in the Sermon on the Mount. It may safely be said that the charter of liberty reaches back to Christ's teaching. Christianity is woven into the web and woof of free government, and but for it free government would not have existed, because no other system has been able to check the selfishness, greed, arrogance, cruelty and covetousness of the race."

State v. O'Rourk, 53 N. W. 593 (Neb.).

"No free government now exists in the world unless where Christianity is acknowledged and is the religion of the country. So far from Christianity as the counsel

contends being part of the machinery necessary to despotism, the reverse is the fact."

Updegraph v. Commonwealth, 11 Serg. & R. 406.

"The laws and institutions of this state are built on the foundation of reverence for Christianity."

Zeisweiss v. Jones, 63 Pa. 465, per SHARSWOOD, J.

The indebtedness of our government to the Bible is shown by the speech of Emilio Castelar to the Spanish Constitutional Convention in 1870. He said:

"The French democracy has a glorious lineage of ideas—the science of Descartes, the criticism of Voltaire, the pen of Rousseau the monumental encyclopedia; and the Anglo-Saxon democracy has for its only lineage a book of primitive society, the Bible. The French democracy is the product of all modern philosophy, is the brilliant crystal condensed in the alembic of science; and the Anglo-Saxon democracy is the product of a severe theology learned by the few Christian fugitives in the gloomy cities of Holland and of Switzerland, where the morose shade of Calvin still wanders. . . . Nevertheless, the French democracy, that legion of immortals, has passed like an orgie of the human spirit, drunken with ideas—like a Homeric battle, where all the combatants, crowned with laurels, have died on their chiseled shields; while the Anglo-Saxon democracy, that legion of workers, remains serenely in its grandeur, forming the most dignified, most moral, most enlightened and richest portion of the human race."

Harper's Monthly, July 1872, p. 220.

"It would be strange that a people, Christian in doctrine and worship, many of whom or whose forefathers had sought these shores for the privilege of worshipping God in simplicity and purity of faith, and *who regarded*

religion as the basis of their civil liberty and the foundation of their rights, should, in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law the religion which was dear to them as life, and dethrone the God who they openly and avowedly professed to believe had been their protector and guide as a people."

Lundenmuller v. People, 33 Barb. 561.

"Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence, if it be deemed, what it has ever been deemed by its truest friends to be, the religion of liberty. Montesquieu has remarked that the Christian religion is a stranger to mere despotic power."

Story, Constitution, § 1873.

This debt to the Christian religion was recognized even at the time of the formation of the Government. In his first inaugural address Washington said:

"Such being the impressions under which I have, in obedience to the public summons, repaired to the present station, it would be peculiarly improper to omit, in this first official act, my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that his benediction may consecrate to the liberties and happiness of the people of the United States a government instituted by themselves for these essential purposes, and may enable every instrument employed in the administration to execute with success the functions allotted to his charge. In tendering this homage to the great Author of every public and private good, I assure myself that it expresses your sentiments not less

than my own; nor those of my fellow-citizens at large less than either. *No people can be bound to acknowledge and adore the invisible hand which conducts the affairs of men more than the people of the United States.*"

Christianity and the Common Law.

With this "free government" having for "its lineage a book of primitive society, the Bible," and into whose "web and woof" is woven Christianity, came the common law, and with the common law and as an integral part of it we have the Christian religion,—thus making another tie between the government and Christianity. That Christianity is a part of the common law there can be no doubt—not in the sense that transgressions of the scriptural law as such will be punished by the courts, but in the sense that "its divine origin and truth are admitted," that the common law takes "cognizance of and gives faith and credit to the religion of Christ as the religion of the common people," that it recognizes "God as the only proper object of religious worship and the Christian religion as the religion of the people."

"*It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania.* But this proposition is to be received with appropriate qualifications, and in connection with the bill of rights of that State, as found in its constitution of government. The constitution of 1790 (and the like provision will, in substance, be found in the constitution of 1776, and in the existing constitution of 1838) expressly declares: 'That all men have a natural and indefeasible right to worship Almighty God

according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.' Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that *its divine origin and truth are admitted,* and therefore, it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."

Vidal v. Girard's Ex'rs, 2 How. 198.

"Christianity, general Christianity, is and always has been a part of the common law of *Pennsylvania;* Christianity, without the spiritual artillery of *European* countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, *William Penn;* not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men."

Updegraph v. Commonwealth, 11 Serg. & R. 400.

"Sunday, or the Sabbath, is properly and emphatically called the Lord's day, and is one amongst the first and most sacred institutions of the Christian religion. This system of religion is recognized as constituting a part and parcel of the common law, and as such all of the institutions growing out of it, or in any way connected with it, in

case they shall not be found to interfere with the rights of conscience, are entitled to the most profound respect, and can rightfully claim the protection of the law-making power of the State."

Shover v. State, 5 Eng. (Ark.) 263.

"It [the common law] took cognizance of and gave faith and credit to the religion of Christ as the religion of the common people; it acknowledged their right voluntarily to prefer that religion and to be protected in the enjoyment of it."

State v. Chandler, 2 Harr. (Del.) 553, 563.

"It is not disputed that Christianity is a part of the common law of England; and in *Rex v. Woolston* (Str. 834) the Court of the King's Bench would not suffer it to be debated, whether to write against Christianity in general was not an offense punishable in the temporal courts at common law. The common law, as it was in force on the 20th day of April, 1777, subject to such alterations as have been made from time to time by the legislature, and except such parts of it as are repugnant to the constitution, is, and ever has been, a part of the law of the state. (Const. of 1846, art. 1, par. 17; Const. of 1821, art. 7, par. 13; Const. of 1777, par. 25.) The claim is, that the constitutional guaranties for the free exercise and enjoyment of religious profession and worship are inconsistent with and repugnant to the recognition of Christianity, as the religion of the people entitled to, and within the protection of the law. It would be strange that a people Christian in doctrine and worship, many of whom or whose forefathers had sought these shores for the privilege of worshipping God in simplicity and purity of faith, and who regarded religion as the basis of their civil liberty and the foundation of their rights, should, in their zeal to secure to all the freedom of conscience which they valued so highly,

solemnly repudiate and put beyond the pale of the law the religion which was dear to them as life, and dethrone the God who they openly and avowedly professed to believe had been their protector and guide as a people. Unless they were hypocrites, which will hardly be charged, they would not have dared, even if their consciences would have suffered them, to do so. *Religious tolerance is entirely consistent with a recognized religion.* Christianity may be conceded to be the established religion, to the qualified extent mentioned, while perfect civil and political equality, with freedom of conscience and religious preference, is secured to individuals of every creed and profession."

Lundenmuller v. People, 33 Barb. 561, 562.

"The Supreme Court of Pennsylvania in *Updegraph v. The Commonwealth* (11 Serg. & Rawle, 400–1), which was the case of an indictment for blasphemy, have fully affirmed the principles of Ruggles's case, and have declared that, from the time of Bracton, Christianity was part of the common law of England. To the list of authorities already cited which sustain this opinion may be added, *Tremaine's Pleas of the Crown,* 226; *Rex. v. Doyley, Emlyn's Preface to the State Trials,* 8; 2 *State Trials,* 273; *Whitlock's Speech, Raym.* 162; 4 *Black. Com.* 59; 1 *Hawk.* b. 1 C. 5; *East's P. C.* 3; 3 *Burns. Ec. Law,* 202; 1 *St. Trials,* 302. And in the case of the *Chamberlain of London v. Allen Evans, Esq.*, in 1767, upon a writ of error to the House of Lords (*Black. Com.*, appendix to Bell's edition, vol. 5, p. 145) Lord Mansfield says: 'The eternal principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law; *so that* any person reviling, subverting or ridiculing them, may be prosecuted at common law.'"

State v. Chandler, 2 Harr. 555, 556.

Christianity is therefore, at least to the extent indicated, a part of the common law,—a part of the law of the land.

The American People is a Christian People.

It seems hardly necessary, after this review of the authorities, to cite further authority to show that this people which emigrated to this country in order that they might "worship God according to the dictates of their own consciences"; who regarded Christianity "as the basis of their civil liberty and the foundation of their rights"; and whose great body of law made Christianity a part of itself,—it is hardly necessary to cite authority to show that that people is a Christian people.

"The people of this State, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice."

People v. Ruggles, 8 Johns. 289, per KENT, C. J.

"Although it is no part of the functions of our system of government to propagate religion and to enforce its tenets, when the great body of the people are Christians in fact or sentiment our laws and institutions must necessarily be based upon and embody the teachings of the Redeemer of mankind. It is impossible that it should be otherwise."

Richmond v. Moore, 107 Ill. 429.

"Different denominations of Christians are recognized, but this does not detract from the force of the recognition of God as the only proper object of religious worship and the Christian religion as the religion of the people which it was not intended to destroy but to maintain."

Lundenmuller v. People, 33 Barb. 563.

"Christianity is part of the common law of this State. It is not proclaimed by the commanding voice of any human superior, but expressed in the calm and mild ac-

cents of customary law. Its foundations are broad and strong and deep; they are laid in the authority, the interest, the affections of the people."

Updegraph v. Commonwealth, 11 Serg. & R. 407.

"Those who question the constitutionality of our Sunday laws seem to imagine that the constitution is to be regarded as an instrument framed for a State composed of strangers collected from all quarters of the globe, each with a religion of his own, bound by no previous social ties, nor sympathizing in any common reminiscences of the past; that, unlike ordinary laws, it is not to be construed in reference to the state and condition of those for whom it was intended, but that the words in which it is comprehended are alone to be regarded, without respect to the history of the people for whom it was made.

"It is apprehended that such is not the mode by which our organic law is to be interpreted. We must regard the people for whom it was ordained. It appears to have been made by Christian men. The constitution, on its face, shows that the Christian religion was the religion of its framers. At the conclusion of that instrument, it is solemnly affirmed by its authors, under their hands, that it was done in the year of our Lord one thousand eight hundred and twenty—a form adopted by all Christian nations in solemn public acts, to manifest the religion to which they adhere."

State v. Ambs, 20 Mo., pp. 216, 217.

"As a Christian people, therefore, jealous of their liberty, and desiring to preserve the same, the State has enacted certain statutes, which among other things in effect recognize the Fourth Commandment and the Christian religion and the binding force of the teachings of the Saviour."

State v. O'Rourk, 53 N. W. 594.

"Coming nearer to the present time, the Declaration of Independence recognizes the presence of the Divine in human affairs in these words: 'We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' 'We, therefore, the representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these Colonies, ... solemnly publish and declare,' etc.; 'And for the support of this declaration, with a firm reliance on the protection of Divine Providence we mutually pledge to each other our lives, our fortunes, and our sacred honor.'

"If we examine the constitutions of the various States, we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community. This recognition may be in the preamble, such as is found in the constitution of Illinois, 1870: 'We, the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations,' etc.

"It may be only in the familiar requisition that all officers shall take an oath closing with the declaration 'So help me God.' It may be in clauses like that of the constitution of Indiana, 1816, article XI, section 4: 'The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the de-

ponent, and shall be esteemed the most solemn appeal to God.' Or in provisions such as are found in articles 36 and 37 of the Declaration of Rights of the Constitution of Maryland, 1867: 'That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality or injure others in their natural civil or religious rights; nor ought any person to be compelled to frequent or maintain or contribute, unless on contract, to maintain any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; *provided,* he believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come. That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this constitution.' Or like that in articles 2 and 3 of part 1st of the constitution of Massachusetts, 1780: 'It is the right as well as the duty to all men in society, publicly and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the Universe. . . . As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality, and as these cannot be generally diffused through a community but by the institution of the public worship of God and of

public instructions in piety, religion and morality: therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily.' Or as in sections 5 and 14 of article 7 of the constitution of Mississippi, 1832: 'No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this State. . . . Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the means of education shall forever be encouraged in this State.' Or by article 22 of the constitution of Delaware, 1776, which required all officers, besides an oath of allegiance, to make and subscribe the following declaration: 'I, A B, do profess faith in God the Father and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.' . . .

"If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, 'In the name of God,

amen.' The laws respecting the observance of the Sabbath, with the general cessation of all secular business and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."

Holy Church v. U. S., 143 U. S., pp. 467, 468, 469, 471.

In that case Mr. Justice BREWER concludes that—

"No purpose of action against religion can be imputed to any legislation, state or national, because *this is a religious people.* This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

No other conclusion is possible. The American people at the time when they became an independent nation were and they ever since have been a religious people—a people devoted to the Christian religion.

Mr. Justice STORY, who was admitted to the bar in 1801, only twelve years after the adoption of the Federal Constitution, and who almost immediately thereafter entered public life, and who was therefore as well qualified to write on the subject as anyone could be, in his Commentaries on the Constitution (§ 1873) says:

"In fact *every American colony* from its foundation

down to the Revolution, with the exception of Rhode Island, if, indeed, that State be an exception, *did openly by the whole course of its laws and institutions support and sustain in some form the Christian religion and almost invariably gave a peculiar sanction to some of its fundamental doctrines.* And this has continued to be the case in some of the States down to the present period *without the slightest suspicion that it was against the principles of public law or republican liberty.*"

Nothing less could be expected of a people having such a history, such a government, and such a body of laws.

THE WYANDOTTE CONVENTION.

In 1859 the convention met which framed the present Constitution. The court in construing that Constitution must put itself in the place of the men who framed it and the people who adopted it. For seventy years they had lived under a government which, but for Christianity, could not have existed; the principles of which were found in the Sermon on the Mount; which was built on the foundation of reverence for Christianity; which had "for its lineage a book of primitive society, the Bible"; and the basis of which was religion.

For seventy years they had lived under a code of laws which admitted the divine origin and truth of the Christian religion; which gave faith and credit to the religion of Christ as the religion of the people; and of which the eternal principles—the essential principles of revealed religion—were a part.

For seventy years they had lived under State constitutions containing religious-freedom provisions similar to those in the Constitution which they framed at this convention; *yet under none of these had the right to read the Bible or to reverently recognize the Christian religion in the public schools ever been doubted;* while, as we shall show, in many States those rights had been upheld by the courts.

Provisions hostile to the Christian religion could not be expected in a constitution framed by such a convention and adopted by such a people. There is no room for implications or forced constructions to show such hostility. Unless the Constitution framed by this convention contained clear and unambiguous provisions hostile to Christianity, there is no room for a conclusion that will be other than friendly to it. As was said by Mr. Justice Brewer (143 U. S. 471):

"No purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."

"The extent which I go is to say that the language of this instrument, when read in the light of the fact that this was at that date a Christian nation, is such as to preclude the idea that the framers of the Constitution . . . intended, in the absence of a clear expression to that effect, to exclude wholly from the school all reference to the Bible. I should certainly mistrust my judgment if it led me to a different conclusion, and on the best of grounds."

Pfeiffer v. Board, 77 N. W. (Mich.) 250, 252.

"It would be strange that a people, Christian in doctrine and worship, many of whom or whose forefathers had sought these shores for the privilege of worshipping God in simplicity and purity of faith, and who regarded religion as the basis of their civil liberty, and the foundation of their rights, should, in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law the religion which was dear to them as life, and dethrone the God who they openly and avowedly professed to believe had been their protector and guide as a people. Unless they were hypocrites, which will hardly be charged, they would not have dared, even if their consciences would have suffered them, to do so."

Lundenmuller v. People, 33 Barb. 561.

We say, therefore, that unless by some plain and unambiguous provision in that Constitution a "purpose of action against religion" is shown, no such purpose can be imputed.

The proceedings of the Wyandotte Convention certainly show no "purpose of action against religion." It was there agreed without a division that the clergy be invited to take seats within the bar (Proceedings, p. vii), and the morning sessions were opened with prayer. (Proceedings, p. viii.)

The Constitution.

This convention framed a constitution beginning:

"We, the people of Kansas, grateful to Almighty God for our civil and religious privileges, in order to insure the full enjoyment of our rights as American citizens do or-

dain and establish this Constitution of the State of Kansas."

This certainly referred to the God of the Bible—the Jewish God Jehovah. It would be useless to argue otherwise.

Referring to similar provisions, the court said, in *Lundenmuller v. People*, 33 Barb. 548, 562:

"These provisions and recitals very clearly recognize some of the fundamental principles of the *Christian religion,* and are certainly very far from ignoring God as the Supreme Ruler and Judge of the Universe and the Christian religion as the religion of the people."

"Take the first clause: 'The Lord is my Shepherd.' What does this mean? That might be a matter of construction, but broadly speaking it is a committal to the proposition that the God of the Jews as described and recognized in the Bible, Jehovah, is the real, true and only God." (Brief for Plaintiff in Error, p. 42.)

Take the first clause: "We, the people of Kansas, grateful to Almighty God." What does this mean? That is *not* a matter of construction. It is a committal to the proposition that the people of Kansas are grateful to the God whom as a *nation* they have worshipped under protection of the law for seventy years—the God of the Jews as described and recognized in the Bible, Jehovah, the real, true and only God.

"Every constitution of every one of the forty-four States contains language which either directly or by clear impli-

cation recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essentian to the well-being of the community. This recognition may be in the preamble, such as is found in the constitution of Illinois, 1870: 'We, the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations,' etc."

Holy Church v. U. S., 143 U. S. 467, per BREWER, J.

Either the Constitutional Convention intended a recognition of the God of the Bible and "a profound reverence for religion" in the public schools, or it intended that the Constitution should be excluded from the schools together with the Bible and Christianity, which are the foundation of the Government.

The Constitution also contained the following (art. 6, par. 2):

"The legislature shall encourage the promotion of intellectual, *moral*, scientific and agricultural improvement by establishing a uniform system of common schools. . . ."

"Moral" means "of or pertaining to rules of right conduct," or "in accordance with or controlled by the rules of right conduct." (Century Dict.) In a Christian nation this does not mean rules of right conduct in accordance with the Mohammedan standard—that would justify polygamy; nor according to the Buddhist standard—that would justify Sutteeism. It means rules of right conduct according to the standard of Christianity; and if moral improvement is to

be encouraged by establishing a uniform system of common schools it can be best accomplished by "leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety and industry, by all appropriate means; *and, of course, including the best, the surest, and the most impressive* [*the Bible.*]" (*Vidal v. Girard's Ex'rs,* 2 How. 83, per STORY, J.

Washington, in his farewell address, said:

"Let us with caution indulge the supposition that morality can be maintained without religion."

"The morality of the country is deeply ingrafted upon Christianity."

People v. Ruggles, 8 Johns. 289, per KENT, C. J.

"*No more complete code of morals exists than is contained in the New Testament,* which reaffirms and emphasizes the moral obligations laid down in the Ten Commandments. Concerning the fundamental principles of moral ethics the religious sects do not disagree."

State v. Board, 44 N. W. 974.

"Equally clear is it that the committee of the town of Woburn did not exceed their authority in passing an order that the Bible should be read and prayer offered at the opening of the schools on the morning of each day. No more appropriate method could be adopted of keeping in the minds of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this commonwealth, and which teachers are especially enjoined to carry into effect, is 'To impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth."

Spiller v. Woburn, 12 Allen, pp. 128 and 129, per BIGELOW, C. J.

"Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? Certainly, there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins, 'That all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.' Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches them more? *Where can the purest principles of morality be learned so clearly, or so perfectly, as from the New Testament? Where are benevolence, the love of truth, sobriety and industry so powerfully and irresistibly inculcated as in the sacred volume?* The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety and industry, by all appropriate means; and, of course, including the best, the surest and the most impressive."

Vidal v. Girard's Ex'rs, 2 How., pp. 200, per Story, J.

"The same reasons of State policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions as conservators of the public morals, and valuable if not indispensable assistants in the preservation of the public order."

Cooley Const. Lim. (6th ed.), p. 578.

"The reading of the Bible in the public schools may also be allowed and even commended, from a standpoint which does not involve the question of sectarian instruction nor the rights of conscience. It is conceded by men of all creeds that the Bible teaches the highest morality. In this connection, we cannot do better than quote the language of Justice Story, in the celebrated Girard Will case, 2 How. (U. S.) 127: 'Why may not the Bible, and especially the New Testament, without note or comment, be read and *taught as a divine revelation in the college*—its general precepts expounded, its evidence explained, and its glorious principles of morality inculcated? . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety and industry, so powerfully and irresistibly inculcated as in the sacred volume?'

"The principle underlying these words of so great a jurist as Justice Story is applicable to our public schools. Apart from religious instruction, it must be admitted that sound morality is one of the foundations of good character. An education which does not involve the inculcation of moral principles is incomplete. And why cannot the common precepts of morality be taught by the reading of the Bible better than in any other way?"

Stevenson v. Hanyon, 7 Pa. Dist. Rep. 585.

It must indeed be a very plain constitutional provision that will exclude from a school, the purpose of which is to

encourage moral improvement, the book which contains "the most complete code of morals"—from which "the purest principles of morality can be most clearly and perfectly taught"—which "teaches the highest morality"—by the reading of which "the common precepts of morality can be better taught than in any other way."

It must be a plain provision that will exclude all reference to the Christian religion, "without which morality cannot be maintained"—upon which "the morality of the country is deeply ingrafted"—which is the "conservator of public morals."

Before looking at the provisions which, as counsel claim, accomplish this paradoxical result, we wish to call the attention of the court to the distinction between "religion" on the one hand and "sectarianism," "forms of worship," "modes of worship," on the other; and to the fact that throughout our Constitution, history and judicial decisions that distinction has been rigidly observed.

Religion and Sectarianism.

Religion. "Recognition of and allegiance in manner of life to a superhuman power or superhuman powers to whom allegiance and service are regarded as justly due."—"Any system of faith in and worship of a divine Being or beings." (Century Dict.)

We doubt if any better example or evidence of religion can be found than that in the first words of the preamble of our Constitution—"We, the people of Kansas, grateful

to Almighty God for our civil and religious privileges"—recognition of a superhuman power to whom allegiance is justly due. Such religion the Constitution does not prohibit, either in the schools or elsewhere.

"But while thus careful to establish, protect and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, or bowing in contrition when visited with the penalties of His broken laws."

Cooley, Const. Lim. (6th ed.), p. 578.

Lieber (Civil Liberty and Self-Government), writing in 1853 after a study of the question during the thirty years preceding that date, says (p. 97):

"It belongs to American liberty to separate entirely the institution which has for its object the support and diffusion of religion from the political government.

"We have seen what our [Federal] Constitution says on this point. All State constitutions have similar provisions. They prohibit government from founding or endowing churches and from demanding a religious qualification for any office or the exercise of any right. *They are not hostile to religion,* for we see that all the State governments direct or allow the Bible to be read in the public schools; *but they adhere strictly to these two points: No worship*

shall be interfered with, either directly by persecution or indirectly by disqualifying members of certain sects, or by favoring one sect above the others; and no church shall be declared the church of the state or 'established church'; nor shall the people be taxed by government to support the clergy of all the churches as is the case in France."

Sect—"A party or body of persons who unite in holding certain special doctrines or opinions concerning religion which distinguish them from others holding the same general religious belief; a distinct part of the general body of persons claiming the same religious name or origin." (Century Dict.)

Sectarian—"Of or pertaining to a sect or sects." (Century Dict.)

Form [of worship]—"Fixed order or method; systematic or orderly arrangement or proceeding as to either generals or particulars. Specifically, mere manner as opposed to intrinsic qualities; style. Formality or a formality; ceremony." (Century Dict.)

Mode [of worship]—"Manner; method; way; customary manner; prevailing style; form." (Century Dict.)

Doctrine—"Dogma; tenet. As distinguished from *dogma* and *tenet, doctrine* is a thing taught by an individual, a school, a sect, etc." (Century Dict.)

It is to be noted that the only prohibitions in either the Constitution or the statutes are against compelling any one to attend or support any *form of worship;* against preferences to *modes of worship;* against teaching *sectarian* and *religious doctrine;* against control of school funds by religious *sects.* There is not one word against religion—religion "not founded on any particular religious tenets; not

with an established church and tithes and spiritual courts; but religion with liberty of conscience to all men." The Constitution does not say, "We, the people of Kansas, are grateful to Almighty God for our civil and religious liberty, but it shall be unlawful to say anything about it in the public schools." Nothing is prohibited by the Constitution but sectarianism. The people, after acknowledging their debt to Almighty God, did not, "in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law the religion which was dear to them as life, and dethrone the God who they openly and avowedly professed to believe had been their protector and guide as a people." (KENT, C. J., in 33 Barb. 561.)

This seems to be the view of Judge STORY. In his Commentaries on the Constitution, § 1871, he says:

"The promulgation of the great doctrines of religion, the being and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues;—these can never be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive how any civilized society can well exist without them. And at all events, it is impossible for those who believe in the truth of Christianity as a divine revelation, to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion,

and of the freedom of public worship according to the dictates of one's conscience."

And in § 1873 he says:

"Now, there will probably be found few persons in this or any other Christian country, who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally as a matter of sound policy as well as of revealed truth. In fact, every American colony, from its foundation down to the Revolution, with the exception of Rhode Island, if, indeed, that State be an exception, did openly by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the States down to the present period, without the slightest suspicion that it was against the principles of public law or republican liberty. Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty."

The court will note in the next chapter, in which we shall consider the Constitution section by section, that the distinction between religion, *i. e.*, Christianity and sectarianism, has been universally observed.

THE CONSTITUTION, SECTION BY SECTION.

"The Right to Worship God According to the Dictates of Conscience Shall Never be Infringed."

As we have seen, this language was used in a public document in this country by Samuel Adams so early as 1772. Washington repeatedly used it in letters written by him at the time of his first inauguration. In 1789, in writing to the General Assembly of the Presbyterian Church, he said:

"While all men within our territories are protected in *worshipping the Deity according to the dictates of their consciences,* it is rationally to be expected from them in return that they will all be emulous of evincing the sanctity of their professions by the innocence of their lives and the beneficence of their actions."

10 Harper's Enc. of U. S. Hist. 153.

In writing to a committee representing the United Baptist Churches in Virginia, he said:

"You doubtless remember that I have often expressed my sentiments that every man conducting himself as a good citizen, and being accountable to God alone for his religious opinions, ought to be protected in *worshipping the Deity according to the dictates of his own conscience.*" (Id., p. 154.)

In writing to the Quakers, he said:

"*The liberty enjoyed by the people of these States, of worshipping Almighty God agreeably to their consciences,* is not only among the choicest of their blessings, but also of their rights." (Id., p. 156.)

In writing to the members of the New Church in Baltimore, he said:

"We have abundant reason to rejoice that in this land the light of truth and reason has triumphed over the power of bigotry and superstition, and that *every person may here worship God according to the dictates of his own heart.*" (Id., p. 159.)

Now what was the actual condition in the United States at the time when the above was written?

"The constitution of *Massachusetts* seemed to guarantee entire freedom of religious opinions and the equality of all sects, yet the legislature was expressly authorized and implicitly required to provide for the support of ministers and to compel attendance on their services. . . . The legislature was quick to avail itself of the constitutional requirement and permission. It passed laws subjecting to heavy penalties, any who might question received notions, as to the nature, attributes and functions of the Deity or the divine inspiration of any book of the Old or New Testament, reviving in part the old colonial laws against blasphemy. Similar laws remained in force in *Connecticut* (under the charter), and were reënacted in *New Hampshire.*

"In these States Congregationalism continued to enjoy the prerogative of an established church and to be supported by taxes. . . .

"In *South Carolina* the second constitution declared the 'Christian Protestant religion' to be the established religion of the State. . . . In *Maryland* a 'general and equal tax' was authorized for the support of the Christian religion. . . . In *New Hampshire, New Jersey, North* and *South Carolina* and *Georgia* the chief officers of the State were required to be Protestants. In *Massachusetts* and

Maryland all officers were required to declare their belief in the Christian religion; in *South Carolina* in a future state of punishments and rewards; in *North Carolina* and *Pennsylvania* to acknowledge the inspiration of the Old and New Testaments; and in *Delaware* to believe in the doctrine of the Trinity."

7 Harper's Enc. of U. S. Hist. 396.

Thus it will be seen that when this clause was first used, "the right to worship God according to the dictates of conscience" did not guarantee to all sects and to all conditions of belief and unbelief absolute equality. It simply provided against actual, active persecution. It was not considered inconsistent with it to require a religious qualification, or to provide for an established church, or to permit taxation for the support of the Christian religion. This is shown by the constitutions themselves.

Thus the constitution of New Hampshire of 1784 contained the following:

"IV. Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.

"V. *Every individual has a natural and unalienable right to worship* GOD *according to the dictates of his own conscience and reason.*"

Yet it was not considered inconsistent with this to provide in the same constitution for taxation for the support of "public Protestant teachers," as follows:

"ART. 6. As morality and piety, rightly grounded on evangelical principles, will give the best and greatest se-

curity to government, and will lay in the hearts of men the strongest obligations to due subjection; and as a knowledge of these is most likely to be propagated through a society by the institution of the public worship of the Deity, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this State have a right to empower, and do hereby fully empower, the legislature to authorize from time to time, the several towns, parishes, bodies corporate or religious societies within this State, to make adequate provisions, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion, and morality."

The constitution of New Jersey of 1776, in force until 1844, contained the same provision:

"XVIII. That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience."

Yet it was not considered inconsistent with this to provide a religious test as follows:

"That no *Protestant* inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity enjoyed by others their fellow-subjects."

And so the constitution of North Carolina of 1776, in force until 1868, contained the following:

"XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."

Yet the same constitution contained the following:

"XXXII. That no person who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State."

The constitution of Pennsylvania of 1776 contained the following:

"II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own conscience and understanding."

Yet the same constitution contained, not as an exception to, but as coördinate with, that provision, the following:

"Nor can any man who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship."

The same is true of the constitution of 1790 of the same State, in force until 1838. It contained the following:

"SEC. 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences."

But it also provided:

"SEC. 4. That no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth."

The constitution of Tennessee of 1796, in force until 1834, contained the following:

"SEC. 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences."

Yet it also contained the following:

"SEC. 2. No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State."

The same provisions are in the present constitution of Tennessee.

These illustrations might be multiplied almost indefinitely.

It is clear, therefore, that this provision simply protects the "*right to worship God*" against actual persecution, and nothing more. This is shown by our own Constitution. It is a well-settled rule of constitutional construction that nothing is meaningless or useless—that effect is to be given to every section and clause.

Cooley, Const. Lim., p. 72.

If this clause covered the whole field, as counsel contends, it would not be necessary to provide also against the

support of any form of worship or an established church or a religious qualification. Those provisions would be useless.

If the right to worship God according to the dictates of conscience is not infringed by the requirement of a religious qualification or by taxation for religious purposes or by the establishment of a State church, it certainly is not by permitting the Bible to be read in the public schools. This was held in the following cases under similar constitutional provisions:

Pfeiffer v. Board, 77 N. W. (Mich.) 250.
Nessle v. Hum, 1 Ohio N. P. 140.
Spiller v. Inhabitants, 12 Allen (Mass.) 127.
Commonwealth v. Cooke, 7 Am. Law Reg. 417.
Donahue v. Richards, 38 Me. 379.
Stevenson v. Hanyon, 7 Pa. Dist. Rep. 585.

There are no cases whatever in the books holding otherwise.

This clause protects the "right to worship God"—*not the right to hoot at God.* It is in furtherance of the doctrine laid down by Mr. Justice STORY, that "the promulgation of the great doctrines of religion, the being and attributes, the providence of one Almighty God; the responsibility to Him for all our actions founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social and benevolent virtues,—these can never be a matter of indifference in any well-ordered community." (Commentaries,

§ 1871). *It is not to protect disbelief—we must look to some other clause of the Constitution for that.*

This section we take to be the key to the whole paragraph. The rest is explanatory.

"What then is the precise scope and meaning of § 2 of the Bill of Rights? It may be remarked certainly as to all the other sections, that each refers to one particular subject; some, it is true, containing several provisions, but all bearing upon the one subject. This fact is important in determining the scope of this section. From the uniformity in respect to the other sections it may be justly concluded that the same rule obtains in this: *that one general subject-matter is treated of, and that all its language is to be interpreted as having reference to that one subject. So the question really is, not how broad and comprehensive might be the meaning of the last sentence, standing in a separate section, but what is its true intent and meaning when joined with the first sentence in a single section?* Tested in this way, we think the words, 'no special privileges or immunities,' refer to privileges or immunities of a political nature. The section obviously treats of political powers, privileges, and immunities. It commences: 'All political power is inherent in the people.' It thus affirms the sovereignty of the people, that all political power proceeds from them, and *upon the exercise of that power they placed the limitations and restrictions contained in the other part of the section.*"

Atch. Railway Co. v. Mo. Pac. Railway Co., 31 Kan. 660, 665.

So we say here, that section 7 of the Bill of Rights treats of "The right to worship God." The remaining provisions of the section limit or restrict that right.

"Nor Shall Any Person be Compelled to Attend or Support Any Form of Worship.

The object of this clause of the Constitution was simply to prevent taxation for *church* purposes. This is its only purpose and this is all that it accomplishes. It does not make taxation for the purpose of building a state-house illegal because the Senate and House employ chaplains and open their sessions with prayer; nor taxation for prisons and penitentiaries illegal because sheriffs and wardens are required to furnish prisoners with Bibles. (Gen. Stat. 1868, ch. 53, par. 6; ch. 77, par. 18.)

In construing this clause the court must go back to the time when it first appeared in the early constitutions, and must consider the evil sought to be remedied.

In Michigan the constitution contained the following:

"Sec. 39. The legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience, or *compel any person to attend, erect or support any place of religious worship,* or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion."

In a case involving the right to read the Bible in the public schools under this provision of the constitution (*Pfeiffer v. Board,* 77 N. W. [Mich.] 250), the Supreme Court of Michigan said:

"The meritorious question is, whether any student or any taxpayer has been compelled to attend, erect, or support a place of religious worship, or to pay tithes, taxes or

other rates for the support of any minister of the gospel or teacher of religion. In determining this question we should endeavor to place ourselves in the position of the framers of the constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption and another thing to-day, when public sentiments have undergone a change. (*McPherson v. Secretary of State,* 92 Mich. 377, 52 N. W. 469.) It is therefore essential that we determine the intent of this provision by reference to the state of the law or custom previously existing, and by the contemporaneous construction, rather than to test its meaning by the so-called advanced or liberal views obtaining among a large class of the community at the present day.

"A similar provision was introduced into the convention of 1835. The provision was as follows: 'Every person has a right to worship Almighty God according to the dictates of his own conscience, and no person can of right be compelled to attend, erect or support against his will any place of religious worship, or pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.' As is pointed out in the brief of the learned counsel for the respondent (to whom we are much indebted for a most laborious and careful research into the historical origin of this provision), the provision was doubtless taken from the Virginia constitution of 1830. It is clearly shown by that research that the inhabitants of that commonwealth were by statute compelled to attend upon divine service; ministers were, in public statutes, referred to as 'teachers of religion.' In 1784 a statute making provision for the support of ministers of the established church was introduced, under the title of 'A bill to establish a provision for teachers of the Christian religion.' This statute was repealed by a general statute adopted in 1786, entitled 'An

act for establishing religious freedom,' the preamble of which clearly shows that the term 'teacher of religion' was used as synonymous with 'minister.' The constitution of 1830 was but an embodiment of this enactment in the organic law of the State. Can it be said that the adoption of this provision into our constitution of 1835 was intended to have a wider scope? I think not. It is significant that this constitution was adopted in pursuance to authority conferred by article 5 of the articles of compact contained in the ordinance of 1787 (*Scott v. Society,* 1 Doug. 122), which gave to the people of the Territory a right to form a constitution in conformity with the principles contained in the articles. The ordinance of 1787 declared that religion, morality, and knowledge were necessary to good government and the happiness of mankind, and provided that, for these purposes, schools and the means of education shall ever be encouraged. It is not to be inferred that in forming a constitution under the authority of this ordinance, the convention intended to prohibit in the public schools all mention of a subject which the ordinance, in effect, declared that schools were to be established to foster,—particularly as the provision, when traced to its historic origin, is shown to have been aimed at quite another evil. In my opinion this provision, when incorporated into our organic law, *meant simply that the inhabitants of the State should not be required to attend upon those church services which the people of Virginia had been by this same enactment relieved from, and that no one should be compelled to pay tithes or other rates for the support of ministers. If this meaning attached at that time, it has not been changed since."*

In *Monroe v. Monroe,* 20 N. W. (Ia.) 475, the court said:

"The record shows that the teachers of the school are accustomed to occupy a few minutes each morning in read-

ing selections from the Bible, in repeating the Lord's Prayer, and singing religious songs; that the plaintiff has two children in the school, but that they are not required to be present during the time thus occupied. The record further shows that the plaintiff objected to such exercises, and requested that they be discontinued; but the teachers refused to discontinue them, and the directors refused to take any action in the matter.

"The plaintiff concedes that under a statute of Iowa, § 1764 of the Code, if constitutional, neither the school directors nor courts have power to exclude the Bible from public schools. The provisions of statute is in these words: 'The Bible shall not be excluded from any school or institution in this State, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian. . . .

"The plaintiff insists, however, that it is unconstitutional. The provision of the constitution which it is said to conflict with is article 1, § 3, bill of rights. The provision is in these words: 'The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry.*

"The plaintiff's position is that, by the use of the schoolhouse as a place of reading the Bible, repeating the Lord's Prayer, and singing religious songs, it is made a place of worship; and so his children are compelled to attend a place of worship, and he, as a taxpayer, is compelled to pay taxes for building and repairing a place of worship.

"We can conceive that exercises like those described might be adopted with other views than those of worship, and possibly they are in the case at bar; but it is hardly to be presumed that this is wholly so. For the purpose of the

opinion it may be conceded that the teachers do not intend to wholly exclude the idea of worship. It would follow from such concession that the school-house is, in some sense, for the time being, made a place of worship. But it seems to us that if we should hold that it is made a place of worship within the meaning of the constitution, we should put a very strained construction upon it. *The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden.*"

In *North v. Board,* 27 N. E. (Ill.) 54, 55, the court said:

"The legality of the rule is questioned on the sole ground that it violates that clause of § 3, art. 2 of the constitution of this state, which says: 'No person shall be required to attend or support any ministry or place of worship against his consent.' It is not pretended by the petitioner that the exercises at chapel meetings were sectarian, and therefore objectionable; but the only objection to those exercises was and is that they were in part religious worship within the meaning of the above-quoted language of the constitution. In the view we take of the case, that fact may be conceded. The real question on this branch of the case is, was it a violation of that constitutional provision for the respondents to adopt the rule, and require obedience thereto by those attending the university unless excused therefrom? There is certainly nothing in this section of our constitution prohibiting this and like institutions of learning from adopting reasonable rules requiring their students to attend chapel exercises of a religious nature, and to use all at least moral suasion and all argumentative influences

to induce obedience thereto. It is a well-known fact that such institutions do generally adopt similar regulations, and that, with rare exceptions, those attending them yield cheerful obedience thereto, regardless of their personal views on the subject of religion. Many esteem it a privilege to be allowed to attend such exercises. Parents placing their children in colleges and universities often desire that they shall be brought under such influences. Shall a court say such a requirement is, in and of itself, a violation of said constitutional provision, merely because some one or more students attending the university may object to obeying it? More especially should this be done when, as is here shown by the answer, the rules expressly provide that for good cause students may be excused from obedience to such regulation. We have said in construing this section of the constitution: 'Religion and religious worship are not so far placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatever from the public bodies or authorities of the State.' (*Welch v. Sherer,* 93 Ill. 64.) It may be said with greater reason that there is nothing in that instrument so far discountenancing religious worship that colleges and other public institutions of learning may not lawfully adopt all reasonable regulations for the inculcation of moral and religious principles in those attending them. We are clearly of the opinion that the rule is not unlawful. At most it could only be fairly contended that under said clause of the constitution one so desiring it should for reasonable cause be excused from its observance. The whole of said § 3 being considered, it is clear that it is designed to protect the citizen in the free exercise of his religious opinions, and it should be liberally construed to that end."

In *Nessle v. Hum,* 1 Ohio N. P. 140, the court said:

"Section 7 of art. 1, reads: 'All men have a natural and indefeasible right to worship Almighty God according to

the dictates of their own consciences. *No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship, against his consent. . . .'*

"I find, however, that a case largely similar to the one at bar has been determined by the Supreme Court of the State of Maine (38 Maine, 379), in which the constitutional provisions in regard to the rights of conscience and religious belief are almost identical with those of our own constitution, or at least so nearly so as to furnish a very correct solution of the question which is involved in this case, as to whether or not this claimed constitutional right has been invaded by the action of the board complained of in this case. . . .

"In that case the Supreme Court decided, among other things, that the superintending school committee, as it was there called, corresponding to our board of education, had the right to make and enforce the order requiring pupils to read the Bible in the schools, and expel them on their refusal so to do. And in the syllabus of that case the court say, that 'no scholar can escape or evade such requirement, when made by the committee, under the plea that his conscience will not allow the reading of such book. Nor can the ordinance be nullified because the church of which the scholar is a member, hold, and have so instructed its member, that it is a sin to read the book prescribed.'

"'A law is not unconstitutional because it may prohibit what one may conscientiously think right, or require what he may conscientiously think wrong.'

"'A requirement by the superintending school committee, that the Protestant version of the Bible shall be read in the public schools of their town, by the scholars, who are able to read, is in violation of no constitutional provision, and is binding upon all the members of the schools, although composed of divers religious sects.'

"Taking this as a precedent for the construction of the

constitutional provisions in our own State, and as a precedent for the rights which parents and pupils may have growing out of and arising from these constitutional provisions, it is very apparent, if this precedent is followed, that no constitutional right has been invaded, and that no right has been infringed upon, or will be, by the reading of the Bible in the schools as directed by the order of the board of education in this case. And there being no right invaded, and this whole matter being within the jurisdiction and control of the board of education, it follows that the plaintiffs are not entitled to the restraining order asked in this case, and that the demurrer filed to the petition by the board of education should be sustained."

In *Nichols v. School Directors,* 93 Ill. 61, the court said:

"The grievance as set forth in the bill is that the defendants have, as such directors, given permission to different church organizations to hold religious services in the school-house, against the protest of complainant and other taxpayers of the district; that under this permission some of the church organizations purpose holding stated meetings in the school-house; that by this means complainant is compelled to aid in furnishing a house of worship, and for religious meetings, contrary to the law of the land; that he is opposed to such use of the house by the societies; and that such meetings are about to be held in the same, contrary to his wishes,—wherefore he prays the injunction.

"A demurrer was filed in the bill, which the Circuit Court sustained, and dissolved the temporary injunction which had been granted, and dismissed the bill. The complainant appealed to this court.

"By statute the supervision and control of school-houses is vested in the school directors of the district, and 'who may grant the temporary use of school-houses, when not occupied by schools, for religious meetings, and Sunday

schools, for evening schools and for literary societies, and for such other meetings as the directors may deem proper." (Rev. Stat. 1874, p. 958, par. 39.)

"There is clearly sufficient warrant in the statute, if that be valid, for the action of the school directors.

"But the statute is assailed as being unconstitutional. The clauses of the constitution which are pointed out as being supposed to be violated by this statute are the following only: 'No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.' (Art. 2, par. 3.) . . . It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions. . . .

"In what manner, from the holding of religious meetings in the school-house, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings as he complains in his bill, he does not show. We can only imagine that possibly, at some future time, he might as a taxpayer be made to contribute to the expense of repairs rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the school-house might, in that way, cause damage in some degree to the building, upon the idea that continual dropping wears away stone; but the injury would be inappreciable. As respects any individual pecuniary expense which might be in this way involved, we think that consideration may be properly disposed of under the maxim, *de minimis,* etc.

"The thing contemplated by the constitutional provision first above named was a prohibition upon the legislature to pass any law by which a person should be compelled without his consent to contribute to the support of any ministry or place of worship.

"*Such a matter as the subject of complaint here, we do not regard as within its purview.*

"Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation; and thereby, the same as is complained of here, there might be indirectly imposed upon the taxpayer the burden of increased taxation, and in that manner the indirect supporting of places of worship. In the respect of the possibility of enhanced taxation therefrom, this provision of the constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the school-house. There is no pretense that it is in any way in interference with the occupation of the building for school purposes.

"We think the court rightly sustained the demurrer and dismissed the bill, as making no case for an injunction."

In *Davis v. Boget,* 50 Ia. 11, the court said:

"It is next insisted that notwithstanding such use of the house in question may be authorized under the construction of the statute in *Townsend v. Hagan, supra,* yet that such use is in conflict with § 3, art. 1 of the constitution of this State, which provides that the 'General Assembly shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; *nor shall any person be compelled to pay tithes, taxes or other rates for building or repairing places of worship, or the maintenance of any minister or ministry.*'

"It is argued that the permanent use of a public school-house for religious worship is indirectly compelling the tax-

payer to pay taxes for the building or repairing of places of worship. . . .

"We may further say that the use for the purpose named is but temporary, occasional, and liable at any time to be denied by the district electors, and such occasional use does not convert the school-house into a building for worship within the meaning of the constitution. *The same reasoning would make our halls of legislation places of worship because in them each morning prayers are offered by chaplains.*"

In *State v. Scheve,* 91 N. W. (Neb.) 846, one of the principal cases relied upon by plaintiff, the same doctrine is laid down under this clause of the constitution as is shown by the quotation from that case, *infra.*

There are no cases in the books laying down a different doctrine. This clause of the Constitution does not, therefore, support plaintiff's position.

"Nor shall any Control of or Interference with the Rights of Conscience be Permitted."

As we have already shown, if we construe the Constitution strictly, and according to the rule laid down in *Atchison Ry. v. Ry.*, 31 Kan. 660, this means only that there shall be no control of or interference with the rights of conscience in *worshipping God.* Historically it means—and at the time when it was put into our Constitution it meant, as we shall show—that there should be no actual, active persecution on account of religious belief.

Before taking up this point, however, we wish to call the attention of the court to the results that will be reached

if under the circumstances of this case it is held that there has been control of or interference with rights of conscience.

In the first place, there has been no control. The attendance of plaintiff's son was entirely voluntary on his part. He was not obliged to be present, and, being present, he was not required to take part in the exercises. He was simply required to show a decent respect for the rights and beliefs of others, and to avoid disturbing them in the exercise of those rights and beliefs.

The question under this clause is not whether defendant had the right to have the Bible read in the schools, but whether there was control of or interference with plaintiff's rights of conscience or those of his son. That there was not, under the circumstances, has been universally held.

In *Spiller v. Inhabitants,* 12 Allen, 128, the court, by Bigelow, C. J., said:

"Equally clear is it that the committee of the town of Woburn did not exceed their authority in passing an order that the Bible should be read and prayer offered at the opening of the schools on the morning of each day. . . . An order or regulation by a school committee which would require a pupil to join in a religious rite or ceremony contrary to his or her religious opinions, or those of a parent or guardian, would be clearly unreasonable and invalid.

"But we are unable to see that the regulation with which the plaintiff was required to comply can be justly said to fall within this category. In the first place, it did not prescribe an act which was necessarily one of devotion or religious ceremony. It went no further than to require the observance of quiet and decorum during the religious service

with which the school was opened. It did not compel a pupil to join in the prayer, but only to assume an attitude which was calculated to prevent interruption by avoiding all communication with others during the service."

In *North v. Board,* 27 N. E. (Ill.) 55, the court said:

"The real question on this branch of the case is, was it a violation of that constitutional provision for the respondents to adopt the rule, and require obedience thereto by those attending the university *unless excused therefrom?* There is certainly nothing in this section of our constitution prohibiting this and like institutions of learning from adopting reasonable rules requiring their students to attend chapel exercises of a religious nature, and to use all at least moral suasion and all argumentative influences to induce obedience thereto. It is a well-known fact that such institutions do generally adopt similar regulations, and that, with rare exceptions, those attending them yield cheerful obedience thereto, regardless of their personal views on the subject of religion. Many esteem it a privilege to be allowed to attend such exercises. Parents placing their children in colleges and universities often desire that they shall be brought under such influences. Shall a court say such a requirement is, in and of itself, a violation of said constitutional provision, merely because some one or more students attending the university may object to obeying it? *More especially should this be done when, as is here shown by the answer, the rules expressly provide that for good cause students may be excused from obedience to such regulation.* We have said in construing this section of the constitution: 'Religion and religious worship are not so far placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatever from the public bodies or authorities of the State. (*Welch v. Sherer,* 93 Ill. 64.) It may be

said with greater reason that there is nothing in that instrument so far discountenancing religious worship that colleges and other public institutions of learning may not lawfully adopt all reasonable regulations for the inculcation of moral and religious principles in those attending them. We are clearly of the opinion that the rule is not unlawful. *'At most it could only be fairly contended that under said clause of the constitution one so desiring it should for reasonable cause be excused from its observance."*

See also, *Moore v. Monroe,* 20 N. W. 475.

The contention that the parent's conscientious scruples only are considered and that the child's are not, is mere quibbling. A parent may compel his minor child to attend exercises of any kind, whether religious, sectarian or secular—church, Sunday-school, Bible-class, or political log-rolling.

But beyond the fact that there is here no compulsion, is the fact that there is not, within the meaning of this clause of the Constitution, anything to affect rights of conscience. Constitutions must be construed with common-sense. If the reading of the Bible in the public schools for three minutes in the morning is construed to be an interference with rights of conscience, what will follow? The consciences of all persons who accept the Bible literally—and fifty years ago this would have included all Christians—are violated by the teaching of geology and evolution.

"Sacred science, as interpreted by the Fathers of the Church, demonstrated these facts:

"1. That the date of creation was comparatively recent,

not more than four or five thousand years before Christ; 2. That the act of creation occupied the space of six ordinary days; 3. That the Deluge was universal, and that the animals which survived it were preserved in an ark; 4. That Adam was created perfect in morality and intelligence, that he fell, and that his descendants have shared in his sin and his fall. . . .

"Theological authorities were therefore constrained to look with disfavor on any attempt to carry back the origin of the earth to an epoch indefinitely remote, and on the Mohammedan theory of the evolution of man from lower forms, or his gradual development to his present condition in the long lapse of time."

Draper, Religion and Science, ch. 7.

"The first chapter of Genesis teaches the supernatural creation of the present forms of life; modern science teaches that they have come about by evolution. The first chapter of Genesis teaches the successive origin—firstly of all the plants, secondly of all the aquatic and aërial animals, thirdly of all the terrestrial animals, which now exist—during distinct intervals of time; modern science teaches that, throughout all the duration of an immensely long past, so far as we have any adequate knowledge of it (that is, as far back as the Silurian epoch), plants, aquatic, aërial, and terrestrial animals have coëxisted; that the earliest known are unlike those which at present exist; and that the modern species have come into existence as the last terms of a series, the members of which have appeared one after another. Thus, far from confirming the account in Genesis, the results of modern science, so far as they go, are in principle, as in detail, hopelessly discordant with it."

Huxley, Science and Christian Tradition, prologue, p. 35.

If the Bible must be excluded from the schools, must we not also exclude Darwin and Huxley, Spencer and John Fiske, Tyndal and Proctor, and all of the modern scientists and their teachings?

"If the claim is that the sect of which the child is a member has the right of interdiction, and that any book is to be banished because under the ban of her church, then the preference is practically given to such church and the very mischief complained of is inflicted on others.

"If Locke and Bacon and Milton and Swift are to be stricken from the list of authors which may be read in schools, because the authorities of one sect may have placed them among the list of heretical writers whose works it neither permits to be printed, nor sold, nor read, then the right of sectarian interference in the selection of books is at once yielded, and no books can be read to the reading of which it may not assent. Because Galileo and Copernicus and Newton may chance to be found in some prohibitory index, is that a reason why the youth of the country should be educated in ignorance of the scientific teachings of those great philosophers? If the Bible, or a particular version of it, may be excluded from schools because its readings may be opposed to the teachings of the authorities of any church, *the same result may ensue as to any other book.* If one sect may object, the same right must be granted to others. This would give the authorities of any sect the right to annul any regulation of the constituted authorities of the State as to the course of study and the books to be used. It is placing the legislation of the State in the matter of education, at once and forever, in subordination to the decrees and the teachings of any and all sects, when their members conscientiously believe such teachings."

Donahue v. Richards, 38 Me. 379.

If it is a violation of the rights of conscience for the child to hear a portion of the Bible read for three minutes each morning, then the whole curriculum of our common schools and the State University must be changed. *It makes it possible for any student, by simply saying that a certain book or course of study violates his rights of conscience, to have that book or course of study excluded from the schools.*

In *Donahue v. Richards,* 38 Me. 379, the court said:

"The clause in the constitution upon which reliance is specially placed is that '*No one shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions, or sentiments,* provided he does not disturb the public peace nor obstruct others in their religious worship.' The object of this clause . . . *was to prevent pains and penalties, imprisonment or the deprivation of social or political rights, being imposed as a penalty for religious professions and opinions.*

"It was held by the Supreme Court of Massachusetts in *Thurston v. Whitney,* 2 Cush. 104, that the rejection of a witness as incompetent by reason of his want of religious belief was not a violation of the second article of the Bill of Rights, which is similar in its language to the constitutional provisions of this State, to which reference has been made. 'It was,' says Wilde, J., '*Intended to prevent persecutions by punishing anyone for his religious opinions, however erroneous they might be.*'"

Under a constitution providing, "nor shall any interference with the rights of conscience be permitted," it was held

in Ohio that "no constitutional right has been invaded and that no right has been infringed upon, or will be, by the reading of the Bible in the schools as directed by the order of the board of education in this case." (*Nessle v. Hum,* 1 Ohio N. P. 140.)

In *Commonwealth v. Cook,* 7 Am. Law Reg. 421, the court said:

"The child of a Protestant may say: 'I am a conscientious believer in the doctrine of universal salvation. There are portions of the Bible read in school which it is claimed by others tend to prove a different doctrine; my conscience will not allow me to hear it read, or to read it.' Another objects as a believer in baptism by sprinkling: 'There are passages in the Bible which are believed by some to teach a different doctrine. I cannot read it; conscience is in the way.' Still another objects as a believer in one God. 'The Bible, it is claimed by some, teaches a different doctrine; my conscience will not allow me to read it or hear it read.' And so every denomination may object for conscience's sake, and war upon the Bible and its use in common schools.

"Those who drafted and adopted our constitution, could never have intended it to meet such narrow and sectarian views. That section of the constitution was clearly intended for higher and nobler purposes. It was for the protection of all religions—the Buddhist, and the Brahmin, the Pagan and the Jew, the Christian and the Turk, that all might enjoy an unrestrained liberty in their religion, and *feel an assurance that for their religion alone, they should never, by legislative enactments, be subjected to fines, cast into prisons, starved in dungeons, burned at the stake, or made to feel the power of the inquisition.*"

Under a constitution providing, "No human authority can in any case whatever control or interfere with the rights of conscience," it was held that the reading of the Holy Scriptures in either version as a part of the opening exercises in the public schools was not unconstitutional.

Stevenson v. Hanyon, 7 Pa. Dist. Rep. 585.

Even in the cases relied upon by plaintiff, the courts expressly refuse to base their decisions upon this clause of the constitution. Thus, in Nebraska the constitution provides in almost the same language as our own—"nor shall any interference with the rights of conscience be permitted"; and in *State v. School Dist.,* 91 N. W. (Neb.) 846, SEDGWICK, J., concurred in an opinion holding that certain exercises were forbidden by the constitution "solely on the ground that the exercises complained of were 'sectarian instruction' within the meaning of" a clause of their constitution which has no counterpart in our own. And HOLCOMB, J., concurred upon the same ground, expressly excluding all other grounds.

There are in fact no decisions in the books condemning exercises of any kind in the public schools under this clause of the constitution.

"Or any Preference be Given by Law to any Religious Establishment or Mode of Worship."

This clause has no purpose but to prevent the establishment of a state church.

"It belongs to American liberty to separate entirely the

institution which has for its object the support and diffusion of religion from the political government.

"We have seen what our [Federal] Constitution says on this point. All State constitutions have similar provisions. They prohibit government from founding or endowing churches and from demanding a religious qualification for any office or the exercise of any right. They are not hostile to religion, for we see that all the State governments direct or allow the Bible to be read in the public schools; *but they adhere strictly to these two points: No worship shall be interfered with either directly by persecution or indirectly by disqualifying members of certain sects, or by favoring one sect above the others; and no church shall be declared the church of the State, or 'established church'; nor shall the people be taxed by government to support the clergy of all the churches as is the case in France.*"

Lieber, Civil Liberty and Self-Government, p. 97.

In *Donahue v. Richards,* 38 Me. 379, the court said:

"Another clause in the constitution upon which reliance is placed is, that '*No subordination nor preference of any sect or denomination to another shall ever be established by law.*' . . . It is insisted that here is a preference by law. This relates to an act of the legislature, which shall establish the preference of one sect and the subordination of others. The selection of a school book is no preference within this clause. The choice is left entirely to the popular will. One set of town officers may make one selection, and another may make an entirely different one. The most unrestrained liberty of choice is given. It would be a novel doctrine that learning to read out of one book rather than another, or out of one translation rather than another, of a book conceded to be proper, was a legislative preference of one sect to another when all that is alleged is, that the

art of reading was taught, and that without the slightest indication of or instruction in theological doctrines.

"If this were to be regarded as a legislative preference, much more must those laws, by which the Sabbath is established as a day of rest, in which labor except for necessity is prohibited being done, be regarded as a subordination of the religious views of all other sects to those holding that day sacred. Indeed, this very objection has, in many States, been raised against the constitutionality of such law. . . .

"The Jews and the Seventh-Day Baptists regarding Saturday as divinely set apart for rest, find legal impediments to labor on the Christian Sabbath, when they believe it may be lawfully done, and conscientious scruples to their laboring on the preceding day, so that between the law and their consciences they are compelled to abstain from labor on both days; yet this is not regarded as hurting, molesting or restraining them in their persons, liberty, or estates, within the meaning of constitutional prohibitions similar to our own; nor as creating a subordination or preference of one sect over another. *Much more, then, should not the selection of the Bible as a book in which reading only is to be taught be regarded as in the slightest degree in conflict with this portion of the Bill of Rights.*"

A consideration of the first constitutions in which this clause is found shows that it was not intended to guarantee actual equality in all incidental matters, but that it was simply intended to prevent the establishment of a state church. Thus, in the constitution of Pennsylvania of 1790, in force until 1838, it is provided:

"That no preference shall ever be given by law to any religious establishments or modes of worship."

Yet the same constitution contained the following religious qualification:

"SEC. 4. That no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth."

The constitution of Tennessee of 1796, in force until 1834, and also the present constitution of that State, provide:

"That no preference shall ever be given by law to any religious establishments or modes of worship."

Yet the same constitution provides:

"SEC. 2. No person who denies the being of God or a future state of rewards and punishments, shall hold any office in the civil department of this State."

And the constitution of North Carolina of 1776, in force until 1868, while it contains the following:

"XXXIV. That there shall be no establishment of any one religious church or denomination in this State, in preference to any other church or denomination in this State,"

It also provides:

"XXXII. That no person who shall deny the being of God, or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State."

This clause as it first appeared in the State constitutions did not, therefore, provide absolutely against any incidental preference of one belief over another;—it simply provided that there should be no established religion.

Under a constitution providing,

"The general assembly shall make no law respecting an establishment of religion,"

It was held that it was not unconstitutional for teachers of the public schools to occupy a few minutes each morning in reading selections from the Bible, in repeating the Lord's Prayer, and in singing religious songs.

Moore v. Monroe, 20 N. W. (Iowa) 475.

Under a constitution providing,

"Nor shall any preference be given by law to any religious denomination or mode of religion,"

It was held that the directors of a state university might require attendance upon religious chapel exercises.

North v. Board, 27 N. E. (Ill.) 55.

Under a constitution providing,

"No preference shall be given by law to any religious society,"

It was held that a school regulation requiring the reading of the Bible as an opening exercise was not unconstitutional.

Nessle v. Hum, 1 Ohio, N. P. 140.

Under a constitution providing,

"No subordination of any one sect or denomination to another shall ever be established by law,"

It was held that an order of a school committee requiring that the Bible be read and prayer offered at the opening of the public schools was not unconstitutional.

Spiller v. Inhabitants of Woburn, 12 Allen, 128.

And under the same constitution it was held that the following order was legal:

"The morning exercise of all the schools shall commence with reading a portion of the Scriptures in each room by the teachers, and the board recommend that the reading be followed by the Lord's Prayer, repeated by the teacher alone or chanted by the teacher and the children in concert, and that the afternoon session close with appropriate singing; and also that the pupils learn the Ten Commandments, and repeat them once a week."

Commonwealth v. Cook, 7 Am. Law Reg. 421.

Under a constitution providing,

"No subordination or preference of any one sect or denomination to another shall ever be established by law,"

It was held that the Bible might be used in the public schools.

Donahue v. Richards, 38 Maine, 379.

Under a constitution providing,

"No preference shall ever be given by law to any religious establishment or modes of worship,"

It was held that the reading of the Holy Scriptures in

either version as a part of the opening exercises in the public schools was not unconstitutional.

Stevenson v. Hanyon, 7 Pa. Dist. Rep. 585.

We find no case in the books laying down any different doctrine.

"No Religious Sect or Sects shall Control Any Part of the Common-School or University Funds of the State."

We do not think that it can be seriously contended that merely repeating the Lord's Prayer and the Twenty-third Psalm at the opening of the public schools gives any religious sect or sects a control of the common-school or university funds. The mere statement of the proposition shows its absurdity.

Before any action of the executive or enactments of the legislative department may be held unconstitutional, something tangible must be pointed out. What sect or sects are given control of school funds by the Board of Education when it permits the reading of the Bible in the schools? Plaintiff does not attempt to answer this. The Board permits the reading of the Bible, but it is not shown that the Board as a board, or that its members individually, belong to any sect or sects.

In Michigan the constitution contains the following provision:

"No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society,

theological or religious seminary, nor shall property belonging to the State be appropriated for any such purpose."

Regarding this the court said:

"Nor has section forty any more proper application. This section has a very plain meaning, which is that the public money may not be turned over to any religious sect to maintain churches or seminaries, and unless the reading from the Bible or selections from the Bible constitute the public school a religious or theological seminary this section has not in my judgment any application."

Pfeiffer v. Board, 77 N. W. (Mich.) 250.

The court concludes that the reading of the Bible does not constitute the school a religious seminary. It is difficult to see how it could have reached any other conclusion.

"We may further say, that the use for the purpose named is but temporary, occasional, and liable at any time to be denied by the district electors, and such occasional use does not convert the school-house into a building for worship within the meaning of the constitution. *The same reasoning would make our halls of legislation places of worship because in them each morning prayers are offered by chaplains.*"

Davis v. Boget, 50 Ia. 11, 16.

In Illinois the constitution contains the following provision:

"Neither the general assembly nor any county, city or town, township, school district, or other public corporation shall ever make any appropriation or pay from any public fund whatever anything in aid of any church or sectarian purpose or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution controlled by any church or sectarian denomina-

tion whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State or any such corporation to any church or for any sectarian purpose."

In *Nichols v. The School Directors,* 93 Ill. 61, the court in considering the constitutionality of a statute authorizing school directors to rent school buildings for such purposes under this section of the constitution, said:

"The second provision respects the making of appropriation or payment from some public fund in aid of any church or sectarian purposes, and it cannot be claimed that this contemplated use of the school-house is such."

In Pennsylvania the constitution provides as follows:

"No money raised for the support of the public schools of the commonwealth shall be appropriated to or used for the support of any sectarian schools."

Under this provision it was held not unconstitutional to require the reading of the Scriptures as a part of the opening exercises in the public schools.

Stevenson v. Hanyon, 7 Pa. Dist. Rep. 589.

In Ohio the constitution provides as follows:

"No religious or other sect or sects shall ever have any exclusive right to or control of any part of the school funds of this State."

Under this provision a school regulation requiring the reading of the Bible as an opening exercise in school was held not unconstitutional.

Nessle v. Hum, 1 Ohio N. P. 140.

We find no case in the books, and counsel for plaintiff have cited none, in which this clause of the Constitution was held to prohibit exercises of any kind in the public schools.

CONSTRUCTION OF THE CONSTITUTION.

In construing the Constitution, and especially in construing that part of the Constitution known as the Bill of Rights, certain rules of construction and the true nature of the instrument itself must be kept constantly in mind. Constitutions do not originate the rights enumerated in them—they simply protect them.

"In considering the State Constitution we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. 'What is a constitution and what are its objects?' It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law nor the incipient state of government; it is not the cause but the consequence of personal and political freedom; it grants no rights to the people, but it is the creature of their power, the instrument of their convenience. *Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made,* it is but the framework of the political government, and *necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought.* There is nothing primitive in it; it is all derived from a

known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard against the encroachment of tyranny.' (*Hamilton v. St. Louis Court,* 15 Mo. 13.)"

Cooley's Const. Lim., p. 49.

It follows from this that the Constitution in guaranteeing rights as they were thought to exist when the instrument was framed, guaranteed them only with the then well-settled exceptions to them.

"The law is perfectly well settled that the first ten amendments to the [Federal] Constitution commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus the freedom of speech and of the press (Art. I) does not permit the publication of libels, blasphemous or indecent articles or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (Art. II) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (Art. V) does not prevent a second trial if upon the first trial the jury failed to agree or if the verdict was set aside upon the defendant's motion (*U. S. v. Ball,* 163 U. S. 662); nor does the provision of the same article that no one shall be a witness against himself impair his obliga-

tion to testify if a prosecution against him be barred by the lapse of time, a pardon or by statutory enactment (*Brown v. Walker,* 161 U. S. 591.) Nor does the provision that the accused person shall be confronted with the witnesses against him prevent the admission of dying declarations or the depositions of witnesses who have died since the former trial. The prohibition of slavery in the Thirteenth amendment is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the Government. . . . It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards."

Robertson v. Baldwin, 17 Sup. Vt. Rep. 326.

Since it was the custom when our Constitution was framed and adopted to read and repeat passages of Scripture in the public schools in this State (Rec., pp. 115, 150); since as Lieber, whose "political writings are held in great esteem by publicists" (Enc. Britannica), writing in 1853, tells us that "all the State governments direct or allow the Bible to be read in the public schools" (Civil Liberty, and Self-Government, p. 97); since the very convention that framed this Constitution opened its daily sessions with prayer,—in view of all these things, we say that even if the Constitution contained language calculated by any fair construction to forbid the exercises shown by the record in this case,—which it does not,—the court would

under this well-settled rule of construction hold this to be as much of an exception to that language as is the law requiring attendance at the public schools an exception to the Thirteenth amendment to the Federal Constitution, which forbids slavery and involuntary servitude.

At the Wyandotte Constitutional Convention, at which the present Constitution of Kansas was framed, it was agreed without a division that the clergy be invited to take seats within the bar (Proceedings, p. vii), and the morning sessions were opened with prayer. (Proceedings, p. viii.)

This convention, sitting to frame an instrument which was not to originate rights but to protect rights already in existence, used a part of their time for which they were paid by the people in listening to prayer every morning. If, among the rights which the Constitution which they framed was intended to protect, including the right not to be compelled to support any form of worship, was a right not to be taxed for the support of any proceeding in which the Bible was mentioned or prayer was heard, then this convention at the outset violated this right.

Another rule to be borne in mind by the court in construing the Constitution is that—

"Where a clause or provision in a constitution which has received a settled judicial construction is adopted in the same words by the framers of another constitution, it will be presumed that the construction thereof was likewise adopted."

Black, Interpretation of Laws, § 21.

We have seen that all of the clauses of our Constitution which are in question here had been in older State constitutions for from sixty to seventy years when our Constitution was framed; that the Bible had been read under these constitutions almost universally under the older constitutions; and that under many of them the courts have expressly sustained the right to read the Bible in such schools. It must certainly be held, therefore, that these provisions were adopted with the construction which had already been placed upon them.

"Who could indulge the extravagant supposition that the framers of a constitution for the people of a young and growing commonwealth having vast possibilities before it should use language in a sense never before so used, and in such a sense as must necessarily mislead the very people for whom it is framed, and upon whom devolve the duty and necessity of its correct interpretation? . . . The Constitution of Kansas was framed in 1859, and the State admitted into the Union under it in 1861. At this time the meaning of these words and the general scope and authority of legislative power with reference to this question had become well settled by *legislative, executive and judicial construction, practice, and usage.* And while no room is left to doubt that these words had a general signification, no room is left to doubt what that signification was."

Leavenworth v. Miller, 7 Kan. 479, 502.

Another well-settled rule of construction is that the court must consider the times when the Constitution was adopted and the contemporaneous construction given it,—as was

said in the case last cited, the "legislative, executive and judicial construction, practice, and usage."

"Perhaps the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties and rights with all the lights and aids of contemporary history; and to give to the words of each just such operation and force consistent with their legitimate meaning as may fairly secure and attain the ends proposed."

Prigg v. Commonwealth, 16 Pet. 610.

"In the construction of the constitution we must look to the history of the times and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy."

State v. State, 12 Pet. 723.

We have seen that these provisions of the Constitution originally appeared in State constitutions for three purposes only—to prevent the establishment of a State church; to prevent taxation for the support of churches and ministers of the gospel; and to prevent persecution on account of religious belief.

These and these only were the evils sought to be remedied, and the Constitution must be construed with this fact in view; and the construction given the earlier constitutions, in view of this fact, is the construction that must be given the same language in our own Constitution.

"It could not mean one thing at the time of its adoption and another thing to-day when public sentiments have undergone a change."

McPherson v. Blackler, 52 N. W. 409.

Pfeiffer v. Board, 77 N. W. 250.

Having found that the Constitution was adopted with its meaning already settled, the court may look to its construction contemporaneously with its adoption for further light upon its meaning.

"When a particular construction has been generally accepted as correct, and especially when it has occurred contemporaneously with the adoption of the constitution and by those who had an opportunity to understand the intent of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

Cooley, Const. Lim., p. 82.
Pfeiffer v. Board, 77 N. W. 250.
Leavenworth Co. v. Miller, 7 Kan. 479, 502.

Before and at all times since the adoption of our Constitution, passages of Scripture were read and recited in the public schools. (Rec., pp. 115, 142, 150.)

"The return in this case shows that since the admission of this State into the Union, a period of more than half a century, the practice has obtained in all the State institutions of learning of not only reading from the Bible in the presence of students, but of offering prayer; that the textbooks used in the public schools of the State have contained extracts from the Bible, and numerous references to Almighty God, and his attributes;—and all this without objections from any source. The usages we may also take judicial notice of. *In a doubtful case, involving any other question than one which appeals so strongly to the prejudice of men, would not this universal usage, extending over so long a period, be deemed decisive by every one as a practical construction made by the administrative branch of government?*"

Pfeiffer v. Board, 77 N. W. (Mich.) 250.

The Legislature of 1862, many of the members of which had been members of the Constitutional Convention, provided for the appointment and payment of a chaplain, and its sessions were opened with prayer. This was not unconstitutional.

"No principle of constitutional law is violated when . . . legislative sessions are opened with prayer or the reading of the Scriptures."

Cooley, Const. Lim., p. 578.

That Legislature also passed the following laws:

"All oaths in this territory shall be administered by laying the hand on the Holy Bible, or they may swear with uplifted hand, or affirm."

Chap. 155, § 2, Comp. Laws 1862.

"All oaths shall commence and conclude as follows: 'You do solemnly swear, etc. So help you God.'"

Chap. 155, § 3, Comp. Laws 1862.

Law against disturbing religious worship.

Chap. 33, § 243, Comp. Laws 1862.

The Legislature of 1868 passed the following laws:

"The sheriff of each county shall provide, at the expense of the county, for each prisoner under his charge who may be able and desirous to read, a copy of the Bible or New Testament."

Chap. 53, § 6, Gen. Stat. 1868.

"The warden [of the penitentiary] shall furnish, at the expense of the State, a Bible to each of the convicts who can read."

Chap. 77, § 18, Gen. Stat. 1868.

It is insisted that a distinction exists between providing religious instruction for reformatories and other penal institutions as to which the State stands *in loco parentis,* and providing it for the public schools where no such relationship exists. We submit that if such a distinction exists it is one of expediency only—a question for the legislature and not for courts of what ought or ought not to be. So far as the courts are concerned, if the Bible is prohibited in one class of institutions as an infringement of religious liberty it certainly is in the other. In fact, the argument is the stronger in the case of the penal institutions, because in them the inmates are absolutely under the control of the State.

THE STATUTE.

"No Sectarian or Religious Doctrine shall be Taught or Inculcated in any of the Public Schools of the City, but Nothing in this Section shall be Construed to Prohibit the Reading of the Holy Scriptures."

This is the only section of the statutes bearing on the question. It forbids the teaching of *doctrine,* "a thing taught by an individual, a school, or a sect." It does not forbid the reading of the Bible nor a proper acknowledgment of the Christian religion, in the public schools. If the statute be construed in connection with the Constitution, it will be seen that this must be the case.

The Constitution begins:

"We, the people of Kansas, grateful to Almighty God for our civil and religious liberty."

This is religion of the purest kind; "recognition of a superhuman power to whom allegiance is justly due." It is Christianity because it is a recognition of the God of the Bible as the superhuman power to whom allegiance is due. The framers of the Constitution did not intend that this Constitution should be excluded from the schools. They did not intend that the Constitution, speaking for the people, or that the Constitution taken in connection with any statute passed under it, should say:

"We, the people of Kansas, are grateful to Almighty God for our civil and religious liberty, but we are ashamed to let our children hear about it in the public schools."

It was not intended that the school censors should "black out" this sentence, as the Russian censors do, before the Constitution could be used in the schools; nor was it intended that teachers of civil government or constitutional history or any other study involving the Constitution should be tongue-tied and helpless when this sentence was reached, and legally bound to avoid all mention or explanation of this recognition of Christianity and the God of the Bible.

This same Constitution provided that the Legislature should encourage the promotion of *moral* improvement by establishing a uniform system of free schools. Moral, as we have shown, means "in accordance with or controlled by right conduct." In a Christian nation this must mean, not rules of right conduct in accordance with Mohammedan standards or Buddhist standards or Mormon standards, but

rules of right conduct in accordance with Christian standards. The Legislature under this constitutional provision could not deprive the schools of the use of the book which is the foundation of Christian morality; which contains the most complete code of morals in existence; which is the best, the surest and most impressive means of teaching the purest morality; which is conceded by all creeds to teach the highest morality. Nor could the Legislature forbid any reference in the schools to that religion without which morality cannot be maintained, and upon which the morality is deeply engrafted. It is not to be presumed that the Legislature would attempt these things.

But beyond all this is the fact that *morality cannot be taught without teaching religion. Morality, that is, morality according to Christian standards, is a part and a most important part of Christianity.* "No more complete code of morals exists than is contained in the New Testament." (44 N. W. 974.) An observance of this code of morals is "allegiance in manner of life to a superhuman power," and is therefore religion; is "allegiance in manner of life to a superhuman power," that is, the God of the Bible, and is therefore Christianity. So we say that morality cannot be taught in a Christian country without at the same time teaching a very important part of the Christian religion. If, therefore, the statute should be construed to forbid the teaching of unsectarian Christianity,—"the fundamental principles of moral ethics concerning which the re-

ligious sects do not disagree,"—"Not Christianity founded on any religious tenets; not Christianity with an established church and tithes and spiritual courts; but Christianity with liberty of conscience to all men,"—"the great doctrines of religion, the being and attributes and providence of one Almighty God; the responsibility to Him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all personal, social and benevolent virtues"; —if, we say, the statute be so construed as to forbid all reference to or aid from such unsectarian Christianity in the schools, then we say that it is unconstitutional, because it makes it impossible for the schools to accomplish one of the purposes for which they were created.

This seems to be the view of Judge Story. In his Commentaries on the Constitution, § 1871, he says:

"The promulgation of the great doctrines of religion, the being and attributes and providence of one Almighty God; the responsibility to Him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues;—these never can be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive how any civilized society can well exist without them. And at all events, it is impossible for those who believe in the truth of Christianity, as a divine revelation, to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of

the freedom of public worship according to the dictates of one's conscience."

And in § 1873 he says:

"Now, there will probably be found few persons in this or any other Christian country, who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally as a matter of sound policy as well as of revealed truth. In fact, every American colony, from its foundation down to the Revolution, with the exception of Rhode Island, if, indeed, that State be an exception, did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the States down to the present period, without the slightest suspicion that it was against the principles of public law or republican liberty. Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty."

Not the least of the purposes of the public schools is to promote and encourage loyalty and patriotism. If, as said in the last sentence of the above quotation, "there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which the republic must rest"; if "Christianity is woven into the web and woof of free government and but for it free government would not have existed" (53 N. W. 593); if "no free government now exists unless where Christianity is acknowl-

edged and is the religion of the country" (11 Serg. & R. 406); if "religion is the basis of civil liberty" (33 Barb. 561)—then we say that loyalty and patriotism cannot be adequately taught where all reference to the Bible and Christianity and their teachings is illegal. This was Washington's view. His tribute to Christianity, religion and morality as contained in his farewell address is as follows:

"In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and cherish them. A volume could not trace all their connections with private and public felicity. *Let it simply be asked, where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles.*"

We submit that the statute on its face prohibits only the teaching of religious doctrines, tenets and dogmas—sectarianism—and not unsectarian Christianity.

We submit, therefore, that there is nothing in either the Constitution or the laws of this State which excludes unsectarian Christianity from any institution, public or private, in the State.

It is not necessary, however, to go so far as this in this

case. All that was done in this case was to read the Bible *without note or comment.* And here we want to call the attention of the court to the fact that counsel for plaintiff in error has argued himself entirely out of the record. His brief contains repeated statements that the belief that the God of the Bible was the only true God, was a being in the form of a man, etc., was *forced* upon the children (p. 42), and that the Bible was interpreted, rendered and taught to and inculcated into plaintiff's child (p. 76). *These statements are absolutely without foundation in the record.* The selections from the Bible were repeated without note or comment, *and all that is before the court for its decision is whether the repetition of the Lord's Prayer and the Twenty-third Psalm in the schools without note or comment, and when no one is compelled either to be present or to participate, is forbidden by either the Constitution or the statutes.* We have, we think, shown conclusively that it is not forbidden by the Constitution, and that if the statute were so construed as to forbid it, it would be unconstitutional; but the statute in terms provides that "nothing in this section shall be construed to prohibit the reading of the Holy Scriptures." The statute, therefore, in terms permits what was done in this case.

The Bible is not a sectarian book. It is true that different sects find support in it for different beliefs; but so is it true that different political parties find support for different political beliefs in the Constitution. *The one is no*

more a sectarian religious document than is the other a partisan political document.

Suppose that the Constitution, instead of providing that no sectarian or religious doctrine should be taught, provided that no partisan or political doctrine should be taught: it could not be contended that that would exclude the Constitution of the United States from the schools because different political parties—Federalist, States-rights, Republican and Democratic—had found in it support for different political beliefs.

"It is the remark of a profound scholar that there is hardly a sentence in any of the best English authors about the meaning of which, if a question of propriety were to depend upon its construction, a doubt might not be raised. These unavoidable difficulties are necessary, and irremediable imperfections are enhanced in this case from the circumstance that the Bible was first written in a foreign tongue. The reading of the various canonical books are almost innumerable, amounting in the New Testament alone to above fifty thousand,—the inevitable result of transcriptions by individuals at different and successive times. They consist for the most part in the omission or insertion of words, in transpositions, or in differences of terminations where the same word is used. Although the various readings are thus numerous, yet but in a few instances do they affect the meaning. . . . When the translation is accomplished and an agreement as to the English word is established, the meaning is still a matter of conflict, as is evidenced by the dogmatic theology of numerous and discordant sects who, all resorting to the same source of instruction, differ so essentially in the meaning to be given to its language. Such being the case, all that is shown by

the selection of one version is simply a preference of one over another when there must from necessity be a difference of opinion. But in case of numerous translations of a work unobjectionable in itself, a preference may be expressed and acted upon without infringing upon the just rights of others."

Donahue v. Richards, 38 Me. 379, 400.

In *Vidal v. Girard's Ex'rs,* 2 How. 127, a testator made a devise to a college from which all sectarians and sectarianism were to be excluded; yet the United States Supreme Court held that the Bible might still be used in the college, saying (p. 200):

"All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety and industry, by all appropriate means; and of course including the best, the surest, and the most impressive"—the Bible.

"We do not understand how the reading of the Bible in the public school can be termed sectarian instruction. The Bible is not a sectarian book. On its broad foundation Christianity rests. Without it there is no Christianity. This proposition is recognized in every division of Christendom throughout the whole world. It is not the book of any sect. Our attention is called to the fact that there are two versions of the Holy Scriptures, the Douay and the King James version, and that they differ in many particulars. The study of these differences is interesting to the theologian and the Bible scholar. . . .The Bible in either version is substantially and essentially the same book. . . . The assertion that the Bible in either version is a sectarian

book borders on sacrilege, and this phase of the question deserves no further consideration at our hands."

Stevenson v. Hanyon, 7 Penn. Dist. Rep. 585.

The very cases relied upon by plaintiff in error hold that the Bible is not a sectarian book. The opinion in *State v. Scheve,* 91 N. W. 846, must be read in connection with the opinion overruling a petition for a rehearing in the same case. (93 N. W. 169.) There the court in explaining its first opinion, said:

"Why may not the Bible be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral. Its language is unequalled in purity and elegance. Its style has never been surpassed. Among the classics of our literature it stands preëminent. It has been suggested that the English Bible is, in a special and limited sense, a sectarian book. To be sure, there are, according to the Catholic claim, vital points of difference with respect to faith and words between it and the Douay version. In a Pennsylvania case cited by counsel for respondents, the author of the opinion says that he noted over fifty points of difference between the two versions,—some of them important and others trivial. These differences constitute the basis of some of the peculiarities of faith and practice that distinguish Catholicism from Protestantism, and make the adherents of each a distinct Christian sect. But the fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used. *The law does not forbid the use of the Bible in either version in the public schools.*

"It is not proscribed either by the constitution or the statutes, and the courts have no right to declare its use to

be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. . . .

"The section of the constitution which provides that 'no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by public funds set apart for educational purposes,' cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the State."

In the original opinion in the same case the court said:

"The Bible itself is not a sectarian book, and it is an erroneous conception to so regard it."

Even in *State v. Weiss,* 44 N. W. (Wis.) 967, the only case in the books holding the Bible to be a sectarian book, and where the proposition which can only be characterized as absurd was laid down that—

"The 'sectarian instruction' prohibited in the common schools by the constitution of Wisconsin, art. 10, § 3, is instruction in the doctrine held by one or other of the various religious sects and not by the rest; and hence the reading of the Bible in such schools comes within the prohibition, since each sect, with few exceptions, bases its peculiar doctrines upon some portion of the Bible the reading of which tends to inculcate those doctrines,"—

even in this case the court said:

"Furthermore, there is much in the Bible which cannot be justly characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruc-

tion of the pupils. Much of it has great historical and literary value, which may be thus utilized without violating the constitutional prohibition. *It may also be used to inculcate good morals,—that is, our duties to each other,—which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the Ten Commandments. Concerning the fundamental principles of moral ethics, the religious sects do not disagree.*"

Even that court would permit the use of the Bible for the purpose of teaching Christian morality—the morality of the New Testament and of the Ten Commandments, and the fundamental principles concerning which "the religious sects do not disagree." Such a book certainly may not be excluded from a school established for the purpose of encouraging moral improvement.

We think it is clear, therefore, that the Bible is not a sectarian book, and that it is not excluded from the schools either by the Constitution or the statutes.

THE AUTHORITIES RELIED UPON BY PLAINTIFF IN ERROR.

In *Board v. Minor,* 28 Ohio St. 211, relied upon by counsel for plaintiff in error, an attempt was made to enjoin the School Board of Cincinnati from repealing an order requiring the reading of the Bible in the public schools on the ground that the Constitution, in providing that "religion . . . being essential to good government, it shall be the duty of the general assembly to pass suitable

laws to protect every religious denomination . . . and to encourage schools and the means of instruction," required the teaching of religion in the public schools. In that case the court decided two points and two only, and those points do not touch the controversy here.

The court in that case decided:

1. The discretion of the Board in its management of the public schools could not be interfered with by injunction.

2. That the provision of the State Constitution which provided that "religion, morality and knowledge being essential to good government, it shall be the duty of the general assembly to pass suitable laws, . . . to encourage schools and the means of instruction," was not self-executing, even if it could be held to require religious instruction in the schools, and that there had been no action taken by the Legislature under it.

This was all that case decides, and this is all that it was regarded by the courts of Ohio as having decided.

Nessle v. Hum, 1 Ohio N. P. 140.

In the latter case, in which the right to read the Bible in the schools was upheld, the court said regarding the Minor case:

"The case was argued at length, and a very elaborate opinion prepared by Judge Welch. The court unanimously decided, as is shown by the syllabus in the case, that, 'the constitution of the State does not enjoin or require religious instruction, or the reading of religious books, in the public schools of the State.

"'The legislature having placed the management of the public schools under the exclusive control of directors, trustees and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what books shall be read therein;' and for these reasons the Supreme Court refused to interfere with the action of the Board of Education, or to restrain them from enforcing and carrying into effect the resolutions mentioned."

The *Minor* case is not, therefore, an authority in plaintiff's favor.

State v. Weiss, 44 N. W. (Wis.) 967, is relied upon by plaintiff. That case is an anomaly, and stands absolutely alone in holding that the Bible is a sectarian book. Yet even in that case *the court holds that the Bible may be used as a text-book in morals.* The court said in that case:

"Furthermore, there is much in the Bible which cannot be justly characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has great historical and literary value, which may be thus utilized without violating the constitutional prohibition. It may also be used to inculcate good morals,—that is, our duties to each other,—which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the Ten Commandments. Concerning the fundamental principles of moral ethics, the religious sects do not disagree."

State v. Scheve, 91 N. W. 846, is relied upon by counsel

for plaintiff, but that opinion has been materially modified by the opinion in the same case reported in 93 N. W. 169.

In that case, besides reading the Bible, the exercises were as follows:

"The regular morning exercises of the school consisted of a formal or improvised prayer, followed by the singing of gospel hymns, such as 'Jesus, Lover of My Soul,' and 'When He Cometh.' In these exercises the pupils were compelled to join, and it was their custom, when prayer was offered, to rise from their seats and stand in an attitude of reverence." (93 N. W. 170.)

The pupils were not allowed to be absent from these exercises, as in the case at bar, but were compelled to be present.

In the second opinion in this case the court said, in addition to what we have already quoted, the following in relation to the first opinion:

"The decision does not, however, go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction. The pith of the opinion is in the syllabus, which declares that 'exercises by a teacher in a public school in a school building, in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Deity, in accordance with the doctrines, beliefs, customs or usages of sectarian churches or religious organizations, are forbidden by the constitution of this State.' Certainly the Iliad may be read in the schools without inculcating a belief in the Olympic divinities, and the Koran may be read without

teaching the Moslem faith. Why may not the Bible also be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral. Its language is unequaled in purity and elegance. Its style has never been surpassed. Among the classics of our literature it stands preëminent. . . .

"The fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used. The law does not forbid the use of the Bible in either version in the public schools." (93 N. W. 170.)

Both the Nebraska and the Washington cases were expressly decided upon a constitutional provision which has no counterpart in our own constitution.

In Wisconsin the constitution contains the following provision:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years, and *no sectarian instruction shall be allowed therein.*"

The Nebraska constitution contains the following provision:

"No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes."

These two cases were decided expressly upon these provisions.

In the principal decision in the Wisconsin case, the court said (44 N. W. 975):

"A number of cases in different States supposed to have a bearing upon the main question here considered and determined have been cited and quotations made therefrom at considerable length by the respective counsel, and by the circuit judge in his elaborate opinion overruling the demurrer to the answer. None of the States in which those decisions were made seem to have in their constitutions a direct prohibition of sectarian instruction in the public schools. It is believed that this State was the first to expressly embody the prohibition in its fundamental law, and we are not aware of any direct adjudication of the question under consideration previous to Judge Bennett's decision in this case. . . . Practically, therefore, we are now determining a question of first impression, and it must be determined upon general principles of law."

And so in the Nebraska case, the court in the deciding opinion said:

"It may be unnecessary to remark that neither the writer nor the court is intended to be committed to any view of the matters of theological or exegetical controversy touched upon in the foregoing discussion. All that is intended to be said is that such matters, being the subjects of sectarian differences, are precluded by the express words of the constitution from being taught or in any degree countenanced in educational institutions maintained to any extent by the public funds."

Judge Sedgwick, concurring specially, said:

"I concur in the conclusion reached by the commissioners, solely on the ground that the exercises complained of

were 'sectarian instruction' within the meaning of the constitution."

Judge HOLCOMB, concurring specially, said:

"I concur in the foregoing opinion in so far as it is held therein that the exercises which it is sought to have eliminated as conducted in the district school in which respondents charge the school officers violate our constitutional provision declaring that no sectarian instruction shall be allowed in the public schools. As to the views apparently entertained and held to in the opinion to the effect that the exercises complained of constitute thereby the school-house a place of worship within the meaning and contrary to the section of the constitution wherein it is ordered 'no person shall be compelled to attend, erect or support any place of worship against his consent,' I do not agree. In my judgment, such an interpretation is not justified by any sound rule of construction as to the meaning of the provision quoted. (*Moore v. Monroe,* 64 Iowa, 367, 20 N. W. 475, 52 Am. Rep. 444; *Pfeiffer v. Board of Education* [Mich.], 77 N. W. 250, 42 L. R. A. 536.) If the views therein expressed are sound, then it would seem that it is in the power of any taxpayer to prevent religious exercises in any of the penal, reformatory or eleemosynary institutions in the State, and to close the doors of the State capitol to the chaplains of both branches of the legislature. Provisions in substance, if not in the exact language of our constitution, relating to freedom of religious worship and exemption from involuntary support of any place of worship, are found in very many of the constitutions of the different States of the Union. With the exception of the case from Wisconsin, cited in the opinion, I know of no authority holding to the view that exercises in the public schools or other secular institutions of the nature and character shown to have been engaged in in the case at bar would constitute

the place where held a place of worship within the meaning of the fundamental law. . . . Nor do I wish to be understood as holding to the view that it is not within the discretionary power of the authorities of school districts to sanction, if deemed wise, under proper restrictions, the reading of the Bible, or portions thereof, or readings therefrom, in the public schools. *The Bible itself is not a sectarian book, and it is an erroneous conception to so regard it.* Altogether aside from its theological aspects, the Bible has a historical and literary value surpassed by no secular writings. Its moral teachings and precepts are of the purest and highest, and appeal to the noblest impulses of mankind, as no other literary production ever has."

Neither of these cases, therefore, is an authority under our Constitution, because they were expressly decided under a provision which is not contained in our constitution. Nor are they authorities under the statute. The Wisconsin case was decided upon the theory that the Bible is a sectarian book, and that reading from the Bible is sectarian instruction within the meaning of the Wisconsin constitution; but that court stands alone in supporting that theory. It was repudiated even in the Nebraska case.

In the Nebraska case it was decided that the whole exercise—Bible-reading, improvised prayer, and singing of religious songs—was sectarian worship. There were no such exercises in this case.

Moreover, the language in the Nebraska and the Wisconsin constitutions differs very materially from that in our statute; and in addition to this, the language upon which the Wisconsin and Nebraska cases were decided is found

in the Constitution, and it therefore decides the policy of the State in this regard. While here the language relied upon by plaintiff is found in the statutes, which must be read and construed in connection with the provisions of our Constitution and in view of the policy adopted by our Constitution.

Counsel also relied upon the case of *Spencer v. School District,* 15 Kan. 259. In that case the court held that "The use of the school-house for any private purpose, such as holding of religious or political meetings, social gatherings and the like, is unauthorized by law." In that case the court said:

"Indeed, the question as it comes before us may fairly be thus stated: May the majority of the taxpayers and electors in a school district for other than school purposes, use or permit the use of the school-house built with funds raised by taxation? . . . It seems to us that upon well-settled principles the question must be answered in the negative. The public school-house cannot be used for any private purpose. The argument is a short one. Taxation is invoked to raise funds to erect the building; but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club."

That case was decided expressly upon the ground that there could not be taxation for private purposes and not under any of the provisions in the Constitution, respecting religious freedom.

AUTHORITIES.

In the following cases the right to read the Bible in the public schools has been upheld. In some of the cases it has been held that it was not unconstitutional to have prayer and the singing of hymns, or to require the pupils to memorize the Ten Commandments and the Twenty-third Psalm:

Moore v. Monroe, 20 N. W. (Ia.) 475.
Donahue v. Richards, 38 Me. 379.
Nessle v. Hum, 1 Ohio N. P. 140.
Pfeiffer v. Board, 77 N. W. (Mich.) 250.
North v. Board, 27 N. E. (Ill.) 54.
Spiller v. Woburn, 12 Allen, 127.
Commonwealth v. Cook, 7 Amer. Law Reg. 417.
People v. Ruggles, 8 Johns. 289, 5 Amer. Decisions, 335.
Stevenson v. Hanyon, 7 Pa. Dist. Rep. 585.

THE BIBLE AS LITERATURE AND HISTORY.

In many if not all of the cases from which we have quoted, including those relied upon by plaintiff in error, the fact is recognized that the Bible is the foundation of ancient history and a classic of English literature. Thomas Huxley, writing to a friend in 1879, said (2 Life and Letters, p. 9):

"Though for the last quarter of a century I have done all that lay in my power to oppose and destroy the idolatrous accretions of Judaism and Christianity, I have never had the slightest sympathy for those who, as the Germans say, would 'throw the child away along with the bath'—and when I was a member of the London school board I fought for the retention of the Bible to the great scandal

of some of my Liberal friends—who can't make out to this day whether I was a hypocrite, or simply a fool on that occasion.

"But my meaning was that the mass of the people should not be deprived of the one great literature which is open to them—not shut out from the perception of their relations with the whole past history of civilized mankind."

As the "one great literature" and as the "whole past history of civilized mankind" the Bible certainly has a place in the public schools.

In a recent article President Roosevelt said:

"Lincoln . . . built up his entire reading upon his early study of the Bible. He had mastered it absolutely; mastered it as later he mastered only one or two other books, notably Shakespeare; mastered it so completely that he became almost 'a man of one book,' who knew that book and who instinctively put into practice what he had been taught therein."

The President then concluded that the influence of the Bible is "on the side of good taste, good literature, a proper sense of proportion, and simple, straightforward writing and thinking."

"Much of it has great historical and literary value."

State v. Weiss, 76 Wis. 177.

Surely, the court must hesitate a long time before excluding this book from the public schools.

ATTENDANCE NOT COMPULSORY.

We have already quoted authorities holding that the attendance of plaintiff's son upon the exercises in question

was not compulsory under the facts in this case. It is difficult to see how any other conclusion could be reached. It is uncontradicted that he had for a while remained away from the general exercises with the consent of the school authorities, and that that consent had never been withdrawn. The statutes give the Board power to "make all necessary rules for the government of the schools," and it is uncontradicted that different school hours are named for different pupils (Rec., p. 171), and the Board may certainly in its discretion excuse pupils from any exercises or studies that it wishes to be excused from.

It is said that the pupil has the right to attend during the whole of the school day. He certainly has that right, but he is not obliged to. There is, and for a long time has been much discussion as to the value of a classical education. Latin and Greek are still taught in the schools, but these are elective and not compulsory. If a parent does not wish his child to study Latin or Greek, he may keep the child out of school during the hours that they are taught, but he cannot prevent the teaching of them; and if the pupil is present while they are being taught, he is subject to the rules of the school authorities, and certainly has no right to pursue his studies in the face of rules forbidding him to do so.

A better illustration might be one we have already used. Any person who believes the Bible literally and as a whole might well object on grounds of conscience to having his

child taught modern science—especially geology and anthropology as influenced by the doctrine of evolution. That parent would certainly have as good a claim to protection under the Constitution against violation of rights of conscience as has plaintiff in this case. What would a common-sense view of his rights be? He could keep his child out of school while these sciences were being taught, or he could let his child attend school during that time and not receive instruction in these sciences. *But he could not exclude these sciences and all reference to them from the schools on the ground that his child had the right to attend school during the full school day and that, if they were taught, his child might be contaminated by induction; nor could he insist that his child be present and disregard the rules of the school authorities and pursue his studies to the destruction of school discipline and the disturbance of the other pupils.*

Plaintiff and his son have no greater rights in this case, and therefore the presence of plaintiff's son at these exercises cannot, with any show of reason and common-sense, or without disrupting the public-school system and the established curriculum, be said to have been compulsory.

THE TREATY WITH TRIPOLI.

Counsel have found the only public document connected with our Government in which anything that looks toward a

repudiation of Christianity may be found. That is the treaty with Tripoli of 1797, in which it is said:

"As the Government of the United States is not in any sense founded upon the Christian religion; as it has in itself no character of enmity against laws, religion or tranquillity of the Musselman, and as the said States never have entered in any war or act of hostility against any Mohammedan nation," etc.

It is to be noted that the statement that the Government of the United States is not founded on the Christian religion is in this treaty by way of argument only, and has no more than argumentative force. Furthermore, in the treaty with Tripoli of June 14, 1815, which supersedes the treaty of 1797, this provision is omitted. This fact is significant, as the second treaty was entered into only three years after Chancellor KENT's famous decision in *People v. Ruggles*, 8 Johns. 289.

That decision, as was said in *Lundenmuller v. People*, 33 Barb. 548, 566, gives—

"A practical construction to the toleration clause in the State constitution, and limits its effect to a prohibition of a church esablishment by the State and of all 'discrimination or preference' among the several sects and denominations in the 'free exercise and enjoyment of religious profession and worship.' *It does not as interpreted by this decision prohibit the courts or the legislature from regarding the Christian religion as the religion of the people as distinguished from the false religions of the world.*"

And the decision in *People v. Ruggles* attracted so much attention that in the constitutional convention of New York

in 1821 an amendment was proposed to obviate the effect of the decision, which amendment was opposed by Chancellor Kent, Mr. Van Buren, Rufus King, Chief Justice Spencer and others, and was rejected by a large majority.

Lundenmuller v. People, 33 Barb. 548.

DEFENDANT'S POSITION.

Counsel for plaintiff in error have spent much time and type in putting defendant into various "positions" where defendant never put itself, and then with great gusto and oratorical effect driving it away from those positions. It may therefore not be out of place for us to summarize the foregoing argument, and state the conclusions which we think must of necessity be reached.

Plaintiff's son was present at the general exercises voluntarily, and without compulsion either as to himself or his father. This is the plain, undisputed testimony.

Plaintiff's son, when voluntarily present, was not compelled, nor even invited, to take part in the general exercises, but was required merely to "sit erect and in a comfortable position" and refrain from study. This is also the plain, uncontradicted testimony.

The testimony of plaintiff's son was that while the Twenty-third Psalm had been repeated at these general exercises for a year or more that he, the son, at the time of the trial was unable to repeat it. (Rec., p. 137.) This being so, no serious damage seems to have been done to the

conscience of plaintiff's son by his voluntary attendance upon the exercises.

Upon these facts it appears that plaintiff was not, in bringing this suit, looking for religious freedom, but for religious martyrdom or a religious controversy; and on these facts alone we think the judgment of the court below ought to be affirmed.

The general exercises, so far as they are under consideration, consisted solely of the repetition, without note or comment, of certain portions of the Bible, namely, the Twenty-third Psalm and of the Lord's Prayer.

The pupils were not given to understand by word, act or deed or implication that the Bible was inspired; that the King James version was the only true translation; that "no one must be permitted to question the absolute verity of the book known as the Bible, nor the literal accuracy of it in all its parts as interpreted by the Protestant churches."

There was no singing during the morning except on one or two occasions during the year; and none at all after plaintiff's son ceased to avail himself of the permission to stay away from the general exercises; and there was no singing on the last morning, when he was suspended for his refusal to refrain from study during the general exercises. The singing was a part of the regular singing lesson, which took place in the afternoon, and on rare occasions in the morning after the general exercises.

There was nothing objectionable in any of the songs sung.

Defendant never adopted the position of the Ministerial Union as shown by its petition, and never made the sentiments of that Union its own. All testimony in regard to the Ministerial Union is irrelevant.

The general exercises of this school were in no wise changed or affected by the petition of the Ministerial Union, nor by the action of the Board taken thereon.

There was nothing in the said general exercises that violated either the statutory or constitutional rights of plaintiff.

The general exercises consisted solely in repeating a portion of Scripture, and this was expressly authorized by the statute.

The statute does no violence to the Constitution.

The Constitution does not prohibit the reading of the Bible in public schools, either in its letter or in its spirit, on reason or on authority. The constitutional provisions in order to be understood must be looked at with reference to their history and growth; with reference to the mischief intended to be cured; with reference to the manners and customs of the people at the time of its adoption; with reference to the debates and acts of the convention which framed it; with reference to the construction put upon it at the time and since, both by legislature and court; with

reference to the ultimate effect of this or that construction; and finally, with reference to plain common-sense.

Looked at in all these ways the Constitution does not forbid such general exercises as were had in this school, even if such exercises were made compulsory.

There is nothing in the Constitution or the statutes forbidding the recognition or even the teaching of unsectarian Christianity in the schools, nor is there anything requiring it.

Since the Constitution requires the establishment of free schools for the purpose of encouraging moral improvement, —moral according to Christian standards,—no statute should be so construed as to forbid the use of the Bible, which contains the most perfect code of morals in existence, for that purpose; and a statute as so construed would be unconstitutional.

The Bible is not a sectarian book.

The Bible is the foundation of unsectarian Christianity, and as such cannot be excluded without excluding unsectarian Christianity.

The general exercises in this case were expressly authorized by the statute, and the statute is constitutional.

CONCLUSION.

The brief for plaintiff in error is filled from start to finish with the most violent abuse of the Ministerial Union and the Board of Education. We do not believe, however,

that counsel have been able to convince the court that the members of these two reputable bodies are "sterilized, despiritualized, materialized sectarians, pushing like ravenous swine and trampling under their unhallowed feet the 'pearl of great price,' the human conscience"; or that they are making a "brutal effort to . . . persecute, crucify, stunt and paralyze the whole human race."

We have avoided all such vituperation, and have endeavored to argue the case on the law and the facts.

We do not think that we shall be departing from this rule, however, if we now point out to the court that all of the liberality, reasonableness and considerateness has been on the side of defendant; and that the disregard of the rights of others, the bigotry, inconsiderateness and unreasonableness has all been on the side of plaintiff.

Respectfully submitted.

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